88-45 (1)

No. 87 -

In The

Supreme Court of the United States

October Term, 1987

SHERRI SPILLANE
Petitioner,
v
FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,
Respondent.

Petition for Writ of Certiorari
To the Supreme Court of Nevada

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COUNSEL OF RECORD

Questions Presented

I

Did the Nevada Supreme Court aggregate of divorce action orders entered during the automatic stay in petitioner's bankruptcy chapter 13 case, allowing withdrawal of Nevada counsel[1] (October 16, 1986), reconsidering and allowing withdrawal of Nevada counsel to stand (October 30, 1986), directing petitioner to secure new Nevada counsel, pay $1,000 as a sanction, and denying appointment of new Nevada counsel (September 23, 1987), and dismissing petitioner's appeal noticed May 22, 1985 as a sanction for failure to secure new Nevada counsel and pay $1,000 (October 29, 1987), violate section 362(a) of the Bankruptcy Code, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

II

Did the Nevada Supreme Court Order (October 29, 1987) dismissing petitioner's appeal as a sanction for failure to secure new Nevada counsel constitute state action, depriving her of the procedural right established by Nevada Supreme Court Rule 47 to await the never-served and never-filed notice-from-the-respondent to appoint new Nevada counsel or appear in person as a jurisdictional requisite for dismissal of her appeal noticed May 22, 1985, contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

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[1] LIST OF PARTIES. - Veronica L. Burris, Esq., acquired party respondent status by her successful motion to withdraw (Appx. C; Appx. D) from the divorce appeal. The parties named in the case caption are petitioner Sherri Spillane and respondent Frank Morrison Spillane, a/k/a Mickey Spillane.

III

Did the failure of the Eighth Judicial District Court to satisfy itself of the fairness of the decrees dissolving Mickey Spillane's 19 year marriage to the unrepresented petitioner, constitute state action depriving her of Fourteenth Amendment Due Process protection under the Constitution of the United States?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTE

COURT RULE

No. 87 -

In The
Supreme Court of the United States
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SHERRI SPILLANE,

Petitioner

v.

FRANK MORRISON SPILLANE,

a/k/a MICKEY SPILLANE,

Respondent.

Petition for Writ of Certiorari

to the Supreme Court of Nevada

Petitioner Sherri Spillane prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada rendered on October 29, 1987, in case number 16643, also numbered 17584, styled Sherri Spillane, Appellant, vs Frank Morrison Spillane, Respondent, wherein the Nevada Supreme Court dismissed the petitioner's appeal as a sanction in a divorce action docketed in the Eighth Judicial District Court number D 53075, and entered a judgment for $1,000 against petitioner as a sanction.

Opinions Below

The Nevada Supreme Court did not deliver an opinion designated as an opinion. The Nevada Supreme Court entered an unreported order (Appx. A) dismissing petitioner's appeal as a sanction, and entered an unreported order (Appx. B) denying petitioner a rehearing. The Nevada Supreme Court had entered unreported orders prior to the order dismissing petitioner's appeal. The unreported orders are printed in the appendix and are described as (1) single justice order allowing withdrawal of Nevada counsel (Appx. C), (2) three judge panel order reconsidering and allowing withdrawal of Nevada counsel to stand (Appx. D), (3) order denying appointment of new Nevada counsel, sanctioning petitioner $500, scheduling briefs, and striking portion of undocketed appeal in companion case (Appx. E), (4) rules decision functionally excluding review on merits of divorce from scope of appellate review (Appx. F), and (5) order for deferred briefing on merits. The Eighth Judicial District Court rendered an unreported Decision containing findings of fact and conclusions of law in a companion case originally filed on August 22, 1984, docket numbered A 232411, and consolidated with the divorce action docket numbered D 53075 (filed March 24, 1983) which is the subject matter of the proceedings sought to be reviewed; the Decision is printed in the Appendix (Appx. I).

Jurisdiction

The Nevada Supreme Court judgment sought to be reviewed (Appx. A) was rendered on October 29, 1987. The petitioner's timely petition for rehearing was denied on March 30, 1988 (Appx. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since the petitioner specially claims a right to a stay of the Nevada Supreme Court proceedings in accordance with 11 U.S.C. 362(a) (automatic stay provision of the Bankruptcy Code), and also

specially claims a right to be heard on the merits of her appeal under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Statutes and Rules of Court Involved

The case involves section 362(a) of the Bankruptcy Code (Title 11, USC) as amended. Title 11, USC was enacted into law by Act Nov. 6, 1978, P. L. 95-598, Title I, sec. 101, 92 Stat. 2549. Section 362(a) provides:

Sec.362.Automatic stay.
(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of-
(1)the commencement or continuation, including the issuance or employment of process, of a judicial, admistrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2)the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3)any act to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate;
(4)any act to create, perfect, or enforce any lien against property of the estate;
(5)any act to create, perfect, or enforce against property of the estate any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6)any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7)the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor, and
(8)the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

The case involves Rule 47, Nevada Supreme Court Rules:

Rule 47.

Death or removal of attorney; appointment of another attorney or appearance in person.

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

The case involves the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States:

"... nor shall any state deprive any person of life, liberty, or property, without due process of law: ..."

Statement of the Case

On April 26, 1983, the respondent Mickey Spillane obtained an ex parte amended decree of divorce from the petitioner Sherri Spillane in the Eighth Judicial District Court of the State of Nevada, typewritten by the court secretary to the district judge who signed the ex parte amended decree, while he (Mickey Spillane) was personally present in the Clark County Courthouse. Neither the petitioner Sherri Spillane nor the respondent Mickey Spillane was represented in the divorce action (D 53075) from the date the complaint was filed by the petitioner on March 24, 1983, until August 22, 1984, when the petitioner filed a post-trial motion challenging the ex parte amended decree through her former Nevada counsel Veronica L. Burris, Esq.

On February 21, 1985, petitioner Sherri Spillane filed a petition in United States Bankruptcy Court for the District of Rhode Island seeking relief in accordance with chapter 13 of Title 11, United States Code. On June 25, 1986, the bankruptcy court entered an order confirming the petitioner's plan for repayment of her debts.

On April 18, 1985, the Eighth Judicial District Court entered a judgment (Appx. H) denying petitioner's post-trial motion challenging the ex parte amended divorce decree. Petitioner appealed to the Nevada Supreme Court from the judgment denying her challenge to the ex parte amended divorce decree by filing a notice of appeal on May 22, 1985.

On November 25, 1985, the Nevada Supreme Court entered an order (Appx. G) which deferred the briefing schedule. The next order from the Nevada Supreme Court was entered on September 4, 1986 (Appx. F) scheduling briefs. Meanwhile, the Eighth Judicial District Court conducted a trial (over petitioner's objection) in a companion

case docket numbered A 232411 which petitioner had filed against this respondent on August 22, 1984, simultaneously with her post-trial motion in the divorce case D 53075; the district court made findings of fact and conclusions of law in rendering a Decision (Appx. I) on July 16, 1986, on which the district court later based a judgment (Appx. J) entered on July 30, 1986. A part of that judgment after trial "once again denied" (J-2) the petitioner's post-trial motion challenging the ex parte amended divorce decree. From only that part of the judgment after trial the petitioner filed a notice of appeal on August 12, 1986, delaying the filing of her notice of appeal from remaining parts of the judgment until her post-trial motions in the companion case A 232411 were decided. The post-trial motions in the companion case A 232411 were summarily resolved in the trial court after Nevada counsel Veronica L. Burris, Esq. withdrew as counsel. Petitioner pro se filed a notice of appeal in companion case A 232411 on November 5, 1986. That appeal has not yet been docketed in the Nevada Supreme Court. Petitioner has no Nevada counsel to represent her in the companion case A 232411. Patrick Gilbert, Esq., Reno, Nevada, entered his appearance for petitioner only in the divorce action D 53075 appellate proceedings sought to be reviewed.

On October 16, 1986, a single justice of the Nevada Supreme Court granted Ms.. Burris' motion to withdraw from appellate proceedings taken by petitioner Sherri Spillane in district court divorce action D 53075 (Appx. C). On October 30, 1986, a three judge panel reconsidered and allowed Ms. Burris to withdraw (Appx. D). On December 1, 1986, petitioner, acting pro se, requested the Nevada Supreme Court to appoint counsel to represent her on appeal, specially claiming a constitutional right to counsel. On September 23, 1987, the Nevada Supreme Court entered an order (Appx. E) denying appointment of counsel to represent the petitioner, directing her to secure new Nevada counsel, imposing monetary sanctions and warning of dismissal of her appeal if she failed to comply with the order.

On October 26, 1987, petitioner notified the Clerk of the Nevada Supreme Court that she had secured the services of Patrick Gilbert, Esq., to represent her in the proceedings sought to be reviewed.

On October 29, 1987, the Nevada Supreme Court entered an order dismissing petitioner's appeals as a sanction and reducing monetary sanctions earlier awarded against petitioner to a $1,000 judgment. (Appx. A)

Patrick Gilbert, Esq., Reno, Nevada, filed a timely petition for rehearing on behalf of the petitioner. The Nevada Supreme Court entered an order denying the petition for rehearing on March 30, 1988. (Appx. B)

How the Federal Questions are Raised

Petitioner Sherri Spillane was not represented by counsel of record in the appellate proceedings sought to be reviewed from the time of Ms. Burris withdrawal on October 16, 1986, until October 28, 1988, when Mr. Gilbert filed a request with the Clerk of the Nevada Supreme Court for further time to comply with the order entered on September 23, 1987. The request was denied the following day in the Nevada Supreme Court order of October 29, 1987 (Appx. A) dismissing the appeals. In the petition for rehearing filed by Mr. Gilbert on petitioner's behalf he raised a Fourteenth Amendment due process question prescinding from the sua sponte action of the Nevada Supreme Court directing petitioner to secure new Nevada counsel or face dismissal of her appeals (E-4). The petition for rehearing argues at page 5:

> "Respondent failed to comply with SCR 47 requiring him to give...written notice

...

SCR 47 provides: "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person."

...

"The court acted sua sponte, resulting in Appellant being denied her right to be heard on the merits of her appeals in violation of due process of law as secured to her by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. ..."

The respondent never complied with the written notice requirements of Nevada Supreme Court Rule 47. The Nevada Supreme Court never gave petitioner the choice of appearing in person.

In the order entered September 23, 1987 (Appx. E) the Nevada Supreme Court expressly ruled on the petitioner's claim that the proceedings sought to be reviewed have been stayed by the automatic stay provided by 11 U.S.C. §362(a). The order recites (~~E-2~~) (E-3):

"On October 6, 1986, appellant advised this court that she had filed a petition for relief under Title 11 of the United States Code in the United States Bankruptcy Court for the District of Rhode Island on February 21, 1985. On March 19, 1985, the bankruptcy court issued a notice of automatic stay pursuant to 11 U.S.C. §362(a). We infer, from appellant's filing of the notice of automatic stay and from her failure to prosecute the instant appeals, that appellant contends the automatic stay applies to these appeals. This contention is incorrect.

"Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate. Assoc. of St. Croix Hotel, 682 F 2d 446, 448, (3d Cir.1982) (emphasis in original). See also In re Convention Masters, Inc., 46 B.R. 339 (Bankr. D. Md. 1985) (automatic stay does not bar bankrupt party from prosecuting pending actions in a court other than the bankruptcy court). We therefore conclude that the automatic stay does not apply to the instant appeals."

There was no need for the Nevada Supreme Court to infer that petitioner contended that the automatic stay applied to the appellate proceedings sought to be reviewed. By her motion seeking appointment of appellate counsel the petitioner specifically claimed application of the stay in the following words:

> "I would like the chance to brief and argue the merits of my appeals. I do not feel competent to by my own lawyer. I move this Court to appoint a lawyer to represent me before this court. I cannot afford to pay counsel fees because I do not have enough money. My property is subject to control of the United States Bankruptcy Court for the District of Rhode Island under a confirmed Chapter 13 plan for repayment of debts at the rate of $200 per month. The respondent refuses to understand that the chapter 13 proceedings have stayed these appellate proceedings and his motion to strike violates the stay order. I need counsel to argue this and other points on my behalf.
>
> "...since the landmark decision of Boddie v. Connecticut, 401 U.S. 371 (1971), there has been litigation concerning such a right in domestic relations ac-

tions. See, McAninch, A CONSTITUTIONAL RIGHT TO COUNSEL FOR DIVORCE LITIGANTS, 14 Journal of Family Law 509 (1975-76).

"In connection with this request for appointed counsel I point out that one of the issues on appeal is the duty of the trial court as a matter of Fourteenth Amendment due process protection to unrepresented divorce petitioners to satisfy itself that the divorce judgment is fair. That constitutional question was raised in the trial court and is therefore before this court for review.

/s/ Sherri Spillane"

(Appellant's Objection to Respondent's Motion To Strike Appeals, Etc. Filed November 18, 1986, And Appellant's Motion For Appointment Of Counsel By Supreme Court, page 2-3, filed Dec. 1, 1986)

On October 6, 1986, petitioner's foreign counsel filed an opposition in the Nevada Supreme Court to allowing withdrawal of Nevada counsel and claimed as follows:

"...the motion by Veronica Burris, Esq., to withdraw as counsel of record is a nullity in view of the automatic stay since the motion is a continuation of the action (domestic case D 53075) pending at the time (February 21, 1985) Appellant filed her Chapter 13 petition. The continuation of actions pending at the time a petition for chapter 13 relief is filed is stayed under paragraph (1) of 11 U.S.C. 362(a)..." (Appellant's Opposition To Withdrawal Of Nevada Counsel Veronica Burris, Esquire, Until Entry Of New Counsel, page 2, filed Oct. 17, 1986)

Regarding Question Presented III

The divorce case D 53075 had been consolidated with companion action A 232411 (independent action challenging

the ex parte divorce decree) on November 15, 1984. On March 26, 1985, Mickey Spillane's motion to dismiss the independent action was heard and decided. At the conclusion of the hearing the trial court denied the petitioner's post trial motion challenging the ex parte amended decree in the divorce case D 53075, although the divorce case was not assigned for hearing on March 26, 1985. (The judgment based on the decision rendered March 26, 1985, is dated April 16, 1985, and entered April 18, 1985. Appx. H). During the hearing on March 26, 1985, petitioner argued the following allegations contained in the amended complaint filed on January 29, 1985, at page 9, paragraphs v and V1.

> "The absence of sufficient examination of the pro se Plaintiff SHERRI SPILLANE by the Court on April 7, 1983, on hearing her Complaint for Divorce, together with the entry of the original and amended decrees of divorce containing property settlement agreement provisions unfair to the Plaintiff, denied the Plaintiff property rights in community property, alimony and medical expenses, contrary to the Due Process Clause of U.S. Const. Amend. XIV, Sec. 1.
>
> VI
>
> Plaintiff specially claims a right under the Due Process Clause of U.S. Const. Amend. XIV, Sec. 1 to have been afforded a sufficient examination by the Court on April 7, 1983, to determine if she was competent enough to adequately represent herself in her divorce and property settlement hearing and a right to receive a sua sponte unlimited continuance of the hearing, if the court determined that she was not competent to adequately represent herself."

At the hearing petitioner's counsel argued (Reporter's transcript of hearing March 26, 1985, pages 20-21):

"...the court at the time of the hearing was under a constitutional duty to question this pro se plaintiff, and to not have done so constitutes a denial of due process...

"...It is a denial of due process for a judge in a divorce action dealing with a pro se plaintiff not to satisfy himself that the plaintiff is adequately represented..."

At the same hearing on March 26, 1985, petitioner's counsel informed the Eighth Judicial District Court that she had filed a petition for chapter 13 relief in the Bankruptcy Court. (Reporter's transcript, p. 16, hearing of March 26, 1985). The respondent's counsel responded to the advice that a chapter 13 petition had been filed as follows:

"MR. THOMPSON: Your Honor, that is irrelevant to this case entirely.

"THE COURT: ...it is not important..."

Reasons For Granting the Writ

When former Eighth Judicial District Court Judge Robert G. Legakes signed the ex parte amended decree of divorce on April 26, 1983, he knew that the petitioner had been married to celebrity writer Mickey Spillane for 19 years. He also knew that she was unrepresented at the quickie divorce hearing conducted on April 7, 1983, in which her testimony consisted in toto of the following:

"THE COURT: State your name and address.
PLAINTIFF SPILLANE: Sherri Spillane, 3778 Lorraine Lane, Las Vegas, Nevada.
THE COURT: How long have you been a resident of Las Vegas, Nevada?
PLAINTIFF SPILLANE: About four months.
THE COURT: When you first moved here was it your intention to make this your home?
PLAINTIFF SPILLANE: Yes, it was.
THE COURT: Has that intention remained with you up to and including today?
PLAINTIFF SPILLANE: Yes.
THE COURT: You have filed a Complaint for divorce?
PLAINTIFF SPILLANE: I have.
THE COURT: Did you read it before you filed it?
PLAINTIFF SPILLANE: I did.
THE COURT: Are all of the statements in it true and correct?
PLAINTIFF SPILLANE: They are.
THE COURT: There are no minor children in issue of this marriage?
PLAINTIFF SPILLANE: No.
THE COURT: You and your husband have agreed upon the distribution of the assets between yourselves?

PLAINTIFF SPILLANE: Yes we have.
THE COURT: And you do feel that it is fair and equitable under the circumstances of this case?
PLAINTIFF SPILLANE: I do.
THE COURT: You further allege that since the date of your marriage to this Defendant that you have become incompatible?
PLAINTIFF SPILLANE: Yes.
THE COURT: Is there any possibility of reconciliation?
PLAINTIFF SPILLANE: No.
THE COURT: Are you living separate and apart at this time?
PLAINTIFF SPILLANE: Yes.
THE COURT: How long has that been going on?
PLAINTIFF SPILLANE: Three years."

Litigants in divorce actions should be entitled to the protection of the State as a matter of due process of law from their own infirmities and incompetence, when the litigants are not represented by counsel at the hearing. That contention is important enough for this Court to grant certiorari. That contention is an extention of fair access to divorce tribunals as a matter of due process announced in Boddie v. Connecticut, 401 U.S. 371 (1971).

The action of the Nevada Supreme Court in proceeding in the face of the automatic stay to dismiss petitioner's appeal necessarily rests on the assumption that the petitioner's property which is the subject of the divorce action did not come under the control of the bankruptcy court on February 21, 1985, when the petitioner filed her petition for relief under chapter 13 of the Bankruptcy Code (Title 11, U.S.C). The decision that the automatic stay did not apply to the appellate proceedings (E-3) is expressly in

conflict with the decision of the Supreme Court of Utah in Rogers v. Rogers, 671 P. 2d 160 (1983), in which the Utah Supreme Court held that the filing of bankruptcy by a wife, after the filing of a petition for divorce, precluded a Utah trial court from dividing marital property, since the bankruptcy court has jurisdiction over the bankruptcy and over "all related civil matters as well." The Utah Supreme Court stayed property division until either the property is excluded from the bankruptcy or the bankruptcy case is closed.

Conclusion

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Martin Malinou
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(401) 331-2340
Counsel of Record

A-1

NEVADA SUPREME COURT ORDER DISMISSING APPEALS AS A SANCTION AND REDUCING MONETARY SANCTIONS TO $1000 JUDGEMENT ENTERED OCTOBER 29, 1987

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

No. 17584

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order Dismissing Appeals

On September 4, 1986, we sanctioned appellant for filing an untimely appeal in Docket No. 16643. We ordered appellant to pay respondent $500.00 to reimburse respondent for the costs incurred in bringing a motion to dismiss. On September 23, 1987, we noted that appellant had failed to comply with our previous order. We ordered appellant to make the payment within thirty days. We sanctioned appellant an additional $500.00 for filing untimely and duplicative notices of appeal in Docket No. 17584 and a third appeal filed November 5, 1986, which has not yet been docketed in this court. We ordered

appellant to pay the sanctions and to provide the clerk of this court with proof of payment within thirty days.

Further, in our order of September 23, 1987, we directed appellant to secure new Nevada counsel to represent her in these appeals, and to so notify the clerk of this court within thirty days. We also ordered appellant to cause transmission of the record on appeal in Docket No. 17584 within thirty days. We warned appellant that failure to comply with our order would result in the immediate dismissal of Docket No. 16643 and Docket No. 17584.

Appellant has failed to comply with our order of September 23, 1987, in all respects.[1] Accordingly, as a sanction for appellant's flagrant disregard of our previous orders and the appellate rules of this court, we hereby dismiss Docket No. 16643 and Docket No. 17584. Further, our previous orders of September 4, 1986 and September 23, 1987, imposing sanctions on appellant in the amount of $1000.00 remain in effect as a judgement of this court entitled to enforcement in a court of competent jurisdiction. It is so ORDERED.[2]

(signed) , C.J.
Gunderson

(signed) , J.
Steffen

(signed) , J.
Young

(signed) , J.
Springer

(signed) , J.
Mowbray

[1]On October 28, 1987, this court received a letter from Patrick Gilbert, Esq., requesting that we allow appellant additional time to secure Nevada counsel to represent her in these appeals. We deny this request. We note that after appellant's previous counsel withdrew on October 16, 1986, we ordered appellant to secure new Nevada counsel within thirty days. On September 23, 1987, nearly a year later, we allowed appellant an additional thirty days to secure Nevada counsel. Appellant failed to comply with our orders. Attorney Gilbert's request for an extension of time is itself untimely. Further, Gilbert admits that he cannot submit a formal motion at this time because he has been unable to complete the necessary pleadings to perfect association or substitution of counsel. Finally, we note that the record in these appeals reveals that appellant has repeatedly employed tactics of delay and has failed in several instances to comply with our orders. Accordingly, we deny the request for an extension of time.

[2]In light of this disposition, we deny as moot all pending motions in Docket Nos. 16643 and 17584.

B-1

NEVADA SUPREME COURT ORDER DENYING PETITION FOR REHEARING AND CRITICIZING NEW NEVADA ADMITTEE'S REHEARING ARGUMENTS AS FRIVOLOUS WARRANTING SANCTIONS.
ENTERED MARCH 30, 1988

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

No. 17584

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order Denying Petition for Rehearing

This petition for rehearing challenges the judgement of this court, entered October 29, 1987, dismissing docket Nos. 16643 and 17584. Docket No. 16643 was filed on May 22, 1985. By September, 1987, over two years later, appellant still had not filed the opening brief. Docket No. 17584 was filed on August 12, 1986. By September, 1987, appellant had still not filed the record on appeal or the opening brief. On September 4, 1986, we ordered appellant to pay respondent $500 within thirty days because appellant

had filed an untimely notice of appeal in No. 16643. By September, 1987, appellant still had not complied with our order. On October 16, 1986, we ordered appellant to obtain new Nevada counsel within thirty days. By September, 1987, appellant still did not have Nevada counsel.

On September 23, 1987, we granted appellant thirty additional days within which to secure new Nevada counsel, to file the record on appeal in No. 17584, and to comply with our order of sanctions. We also sanctioned appellant an additional $500 for filing duplicative notices of appeal on August 12, 1986, and November 5, 1986. We warned appellant that her failure to comply with our order would result in immediate dismissal of docket Nos 16643 and 17584. Appellant failed in all respects to comply with our order. Accordingly, on October 29, 1987, we dismissed these appeals.

In this petition, appellant and her new counsel, Patrick Gilbert, contend that appellant obtained Nevada counsel as ordered, and that this court misapprehended the facts. This contention is frivolous, and is belied by attorney Gilbert's own letter to this court, dated October 28, 1987. In this letter, Gilbert requested additional time for appellant to secure Nevada counsel. Gilbert stated that he could not submit a formal motion to appear as appellant's counsel because he had been unable to complete the necessary pleading's to perfect association or substitution of counsel. In our order of October 29, 1987, we noted that Gilbert's request for an extension of time was itself untimely, having been received more than thirty days after we ordered appellant to obtain new counsel.

Appellant next contends that she did not have adequate notice that she needed to obtain an attorney, and that she was deprived of an opportunity to be heard on the merits of her appeals. This claim is frivolous. This court repeatedly

ordered appellant to obtain counsel and warned her that her failure to obtain counsel would result in the dismissal of these appeals. Appellant by her own procrastination prevented this court from considering the merits of her appeals.

Appellant next contends that she filed the record on appeal in No. 17584. This contention is false. The record in No. 17584 has never been filed with this court. Appellant failed for over a year to file the record on appeal, forcing the respondent and this court to spend valuable time preparing motions and orders to goad her into filing the record. After more than a year of delay, appellant now makes the spurious claim that "an adequate (although incomplete) record on appeal" was on file all along, i.e., the record in No. 16643.

On September 4, 1986, we sanctioned appellant $500 because she filed an untimely appeal on July 9, 1985, from a divorce decree entered in April, 1983. Appellant contends it was improper to sanction her because it was "plausible" for her to contend that her motion to set aside the divorce decree, brought pursuant to NRCP 60(b), was really a motion for a new trial under NRCP 59, which therefore tolled the time for filing the notice of appeal. We rejected this argument in our order of September 4, 1986. It is frivolous for appellant to raise the same contention now, over one year later. Similarly, we reject appellant's contention that it was improper for this court to sanction her for filing duplicative notices of appeal on August 12, 1986, and November 5, 1986.

We conclude that this petition for rehearing is without merit. Several of appellant's contentions are frivolous and are belied by the record. Respondent has requested that we sanction appellant and her counsel, Patrick Gilbert, for processing this rehearing petition in a frivolous manner.

We agree that appellant has misused the appellate processes of this court, and we admonish attorney Patrick Gilbert that we do not condone the filing of frivolous pleadings before this court. See In re Herrmann, 100 Nev. 149, 679 P. 2d 246 (1984). Because Mr. Gilbert is a recent admittee to the Nevada bar we decline to impose further sanctions in this instance.

Accordingly, appellant's contentions lacking merit, we hereby deny this petition for rehearing.

It is so ORDERED.*

(signed) , C.J.
Gunderson

(signed) , J.
Steffen

(signed) , J.
Young

(signed) , J.
Springer

(signed) , J.
Mowbray

C-1

NEVADA SUPREME COURT ORDER ALLOWING WITHDRAWAL OF NEVADA COUNSEL ENTERED OCTOBER 16, 1985

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

No. 17584

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order

Appellant's Nevada counsel, Veronica L. Burris, has moved to withdraw as counsel of record in both of these appeals. Counsel asserts that appellant has improvidently prosecuted these appeals against her advice, that irreconcilable differences have arisen between her and appellant and appellant's foreign counsel, Martin Malinou, and that appellant cannot pay for her services.

Cause appearing, we grant counsel's motion for leave to withdraw. Accordingly, Burris shall immediately inform appellant of her withdrawal from these appeals, and shall personally serve a copy of this order on appellant, forthwith. Burris shall provide proof of such service to this court at her earliest convenience. Apellant shall have thirty

(30) days from the date of service of this order on her to secure new Nevada counsel to represent her on this appeal. Malinou shall not be allowed to represent appellant in these matters unless and until he associates Nevada counsel and is granted permission to do so.[1] Failure to retain counsel as ordered may result in the immediate dismissal of these appeals.

It is so ORDERED.

(signed), C.J.
Mowbray

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[1]In light of this order, we deny, without prejudice, appellant's motion in docket No. 16643, filed by Malinou, for an extension of time within which to file an opening brief.

D-1

NEVADA SUPREME COURT ORDER DENYING RECONSIDERATION OF ALLOWANCE OF WITHDRAWAL OF NEVADA COUNSEL ENTERED OCTOBER 30, 1986

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

No. 17584

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order

On October 16, 1986, this court granted appellant's Nevada counsel leave to withdraw from her representation of appellant. Through her foreign counsel, Martin Malinou, appellant filed an opposition to counsel's motion to withdraw on October 17, 1986. We elect to treat appellant's opposition as a motion to reconsider our order of October 16, 1986.

Cause appearing, we deny appellant's motion to reconsider our order of October 16, 1986.

It is so ORDERED.[4]

(signed) , C.J.
Mowbray

(signed) , J.
Springer

(signed) , J.
Steffen

E-1

NEVADA SUPREME COURT ORDER DENYING APPOINTMENT OF NEVADA COUNSEL, SANCTIONING PETITIONER $500, SCHEDULING BRIEFS, AND STRIKING PARTS OF UNDOCKETED APPEAL IN COMPANION CASE.
ENTERED SEPTEMBER 23, 1987

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

No. 17584

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order

In these appeals, appellant challenges a divorce decree, an amended divorce decree and several orders of the district court relating to the divorce decrees.

On October 10, 1986, the law firm of Tingey & Burris moved to withdraw as appellant's counsel in these appeals. On October 16, 1986, we granted counsel's motion to withdraw and ordered appellant to secure new Nevada counsel within thirty days. On October 30, 1986, we denied

appellant's motion to reconsider our order of October 16, 1986. On December 1, 1986, appellant requested that this court appoint counsel on her behalf. Cause appearing, we deny this request. Appellant has cited no legal authority which would require this court to appoint counsel on her behalf. See, e.g., In re marriage of McCue, 645 P. 2d 854 (Colo. Ct. App. 1982); Kiddie v. Kiddie, 563 p.2d 139 (Okla. 1977) (there is no constitutionally grounded right to appointment of counsel in a divorce proceeding). In the exercise of our discretion, we decline to appoint counsel to represent appellant.

In our order of October 16, 1986, we ordered that appellant's foreign co-counsel, Martin Malinou, "shall not be allowed to represent appellant in these matters unless and until he associates Nevada counsel and is granted permission to do so." On October 27, 1986, respondent filed a motion requesting "recission" of Malinou's "authority" to practice in this case. Attached to the motion, respondent submitted three orders of the district court documenting Malinou's misconduct before that court. Respondent requests that we sanction Malinou for this misconduct. Cause appearing, we deny respondent's motion. Respondent's motion to "rescind" Malinou's "authority" is moot. Malinou has no authority to practice before this court. Malinou has neither associated Nevada counsel nor requested permission to represent appellant before this court. If Malinou requests permission to act as appellant's counsel, we will consider the documents submitted by respondent in determining whether to grant such permission. Further, we decline to sanction Malinou personally at this time for his conduct before the district court. We note that the district court has already sanctioned Malinou and has withdrawn the authorization to practice before that court.

On October 6, 1986, appellant advised this court that she had filed a petition for relief under Title 11 of the United States Code in the United States Bankruptcy Court for the District of Rhode Island on February 21, 1985. On March 19, 1985, the bankruptcy court issued a notice of automatic stay pursuant to 11 U.S.C. § 362 (a). We infer, from appellant's filing of the notice of automatic stay and from her failure to prosecute the instant appeals, that appellant contends the automatic stay applies to these appeals. This contention is incorrect.

> Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate.

Assoc. of St. Croix Condo. Owners v. St. Croix Hotel, 682 F.2d 446, 448 (3d Cir. 1982) (emphasis in original). See also In re Convention Masters, Inc., 46 B.R. 339 (Bankr. D. Md. 1985) (automatic stay does not bar bankrupt party from prosecuting pending actions in a court other than the bankruptcy court). We therefore conclude that the automatic stay does not apply to the instant appeals.

We note that appellant has failed to comply with our order of September 4, 1986, issued in No. 16643, ordering her to pay respondent $500.00 and to provide the clerk of this court with proof of such payment. The automatic stay entered by the federal bankruptcy court pursuant to 11 U.S.C § 362(a) does not apply to our order sanctioning appellant. We sanctioned appellant for conduct which occurred after she filed the bankruptcy petition. "Proceedings or claims arising postpetition are not subject to the automatic stay." Matter of M. Frenville Co., Inc., 744 F.2d 332, 335 (3rd Cir. 1984), cert. denied, 469 U.S. 1160 (1985) (citations omitted). Accordingly, appellant shall have thirty (30) days from the date of this order within

which to make this payment and to provide the clerk of this court with proof of such payment. Appellant's failure to pay this sum will result in the immediate dismissal of Docket No. 16643 and Docket No. 17584.

Respondent has moved to dismiss appeal No. 16643, appeal No. 17584, and a third appeal filed November 5, 1986, which has not yet been docketed in this court. Respondent has also moved to strike portions of these appeals and requested sanctions for the filing of duplicative and vexatious appeals. Respondent contends that No. 16643 and No. 17584 should be dismissed because of appellant's many delays in prosecuting these appeals. In No. 16643, the appeal is more than two years old, yet appellant has still not filed an opening brief. In No. 17584, the notice of appeal was filed on August 12, 1986; appellant has still not filed the record on appeal. Appellant's procrastination is inexcusable. However, we note that appellant is presently not represented by counsel and that appellant did file a motion in this court requesting the appointment of counsel. In addition, on October 6, 1986, appellant filed the notice of automatic stay pursuant to 11 U.S.C § 362(a), apparently in the belief that the automatic stay applied to these appeals.

Accordingly, we defer resolution of respondent's motion to dismiss appeals No. 16643 and No. 17584. Appellant shall have thirty (30) days from the date of this order to secure new Nevada counsel to represent her on these appeals, and to so notify the clerk of this court. Counsel shall have thirty (30) days thereafter within which to file the opening brief in No. 16643. Appellant shall have thirty (30) days from the date of this order within which to file the record on appeal in No. 17584. Failure to retain counsel and to file the opening brief and record on appeal as ordered will result in the immediate dismissal of these appeals.

We defer ruling on respondent's motion to dismiss the appeal filed on November 5, 1986, because that appeal has not yet been docketed in this court, and there is no record before this court. Additionally, respondent did not request the clerk of this court to docket that appeal for the purposes of filing his motion to dismiss. See NRAP 12(c). In No. 16643, appellant appeals from the amended divorce decree of April 26, 1983, and from a judgment of the district court, entered on April 18, 1985, denying her motion to set aside the divorce decree. In appeal No. 17584, appellant again challenges the amended divorce decree of April 26, 1983, and the judgment of April 18, 1985.

In No. 17584, appellant also appeals from a judgment of the district court, entered July 16, 1986, and an amended judgment of the district court, entered July 28, 1986, granting costs to respondent, denying appellant's motion to set aside the divorce decree, and denying appellant's motion for temporary support, fees and allowances. On November 5, 1986 appellant filed yet another notice of appeal, again challenging the judgment of July 16, 1986, and the amended judgment of July 28, 1986.

Respondent requests that we strike the duplicate portions of these appeals, and that we sanction appellant for filing untimely and duplicative notices of appeal. Cause appearing, we grant respondent's motion. We hereby strike that portion of the notice of appeal No. 17584 which purports to challenge the amended divorce decree of April 26, 1983, and the judgment of April 18, 1985, and that portion of the notice of appeal filed November 5, 1986, which purports to challenge the judgment of July 16, 1986, and the amended judgment of July 28, 1986. Further, we sanction appellant $500.00 to reimburse respondent for the costs incurred in bringing the motion to strike and the motion for sanctions. Appellant shall have

thirty (30) days from the date of this order within which to make this payment to respondent's counsel and to provide the clerk of this court with proof of such payment.[1] Appellant's failure to pay this additional sum will also result in the immediate dismissal of Docket No. 16643 and Docket No. 17584

It is so ORDERED.

(signed), C.J.
Gunderson

(signed), J.
Steffen

(signed), J.
Young

(signed), J.
Springer

(signed), J.
Mowbray

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[1]Respondent additionally contends that sanctions are warranted because the appeal of November 5, 1986, is fraudulent, untimely, and frivolous. Respondent's "proof" of fraud is insufficient to justify the imposition of additional sanctions. Since no record on appeal has been filed, we are unable to determine whether the appeal is untimely or frivolous. Accordingly, we decline to order further sanctions at this time.

NEVADA SUPREME COURT RULES DECISION FUNCTIONALLY EXCLUDED REVIEW OF MERITS DIVORCE FROM SCOPE OR APPELLATE REVIEW ENTERED SEPTEMBER 4, 1986

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order

This is an appeal from (1) a divorce decree and an amended divorce decree; and (2) an order of the district court denying appellant's motion to set aside the divorce decree and the amended decree. The original divorce decree and the amended decree were entered on April 7, 1983, and April 26, 1983, respectively. On May 22, 1985, appellant filed a notice of appeal from the order of the district court denying her motion to set aside the divorce decree. On July 9, 1985, appellant filed a second notice of appeal from the divorce decree and the amended decree. Both notices of appeal have been docketed in this court as case No. 16643. Respondent has now moved to dismiss the portion of this appeal that challenges the divorce decree and the amended divorce decree, on the ground that the notice of appeal was untimely filed under NRAP 4(a).

Appellant concedes that the notice of appeal was untimely as to the original divorce decree. She contends, however, that she was so mentally ill at the time of entry of the

amended decree that she did not have actual or constructive notice of the amended decree until the time she filed a motion to set aside the original decree and the amended decree on August 22, 1984. She further contends that the motion to set aside, brought pursuant to NRCP 60(b), was actually a "motion for a new trial", i.e., one of the motions listed in NRAP 4(a) which toll the running of the thirty day period for filing a notice of appeal.

Appellant's contentions are without merit. The district court sent appellant a copy of the amended decree on April 29, 1983, more than two years before this appeal was filed. In addition, on August 22, 1984, more than ten months before filing the notice of appeal, appellant filed a motion and a complaint seeking to vacate and set aside the original divorce decree and the amended decree. Regardless of the validity of appellant's claim that she was too mentally ill to be cognizant of the notice sent to her by the district court, it is clear that she waived her right to further notice by her subsequent conduct in challenging the divorce decrees. See in re Herrmann, 100 Nev. 1, 25, 677 P.2d 594, 609 (1984).

Appellant's motion to set aside, brought pursuant to NRCP 60(b), did not toll the time for filing the notice of appeal. See Smilanich v. Bonanza Air Lines, 72 Nev. 10, 291 P.2d 1053 (1956). Appellant did not file a motion for a new trial under NRCP 59. Appellant's contentions relating to the time for filing such a motion or its effect on the time for filing a notice of appeal are irrelevant in our consideration of this appeal

We conclude, therefore, that appellant's notice of appeal filed on July 9, 1985, challenging the original divorce decree and the amended divorce decree, was untimely. Furthermore, the notice of appeal filed on May 22, 1985, may not be used to challenge these decrees. See Westside Chtr. Serv. v. Gray Line Tours, 99 Nev. 456, 458,

664 P.2d 351, 352 (1983) (where notice of appeal was timely only as to dismissal of 60(b) motion, and not as to the underlying judgment, court would only consider propriety of denial of motion).

As an alternative argument against dismissal, appellant contends that her appeal may be premature because the district court did not resolve all of her claims and did not certify the order denying the motion to set aside as a final order pursuant to NRCP 54(b). We note, however, that appellant's claims were made in two separate actions, while NRCP 54(b) concerns claims made in a single action. Thus, the district court was not required to certify its order refusing to set aside the divorce decree as final pursuant to NRCP 54(b). See In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439 (1st Cir. 1972). Appellant's appeal is therefore not premature.

Accordingly, our consideration of this appeal shall be limited to the notice of appeal filed on May 22, 1985, and to the issue of the propriety of the district court's denial of appellant's motion to set aside the divorce decrees. Appellant shall have forty (40) days from the date of this order within which to file an opening brief. Thereafter, briefing shall proceed in accordance with NRAP 31.

Respondent has requested that we sanction appellant for filing the appeal of July 9, 1985, from the original and the amended divorce decrees, on the ground that the appeal is grossly untimely and vexatious. Cause appearing, we grant respondent's request for sanctions. Because of appellant's actions, respondent has had to spend valuable time in preparing the motion to dismiss and other responsive papers. The staff of this court has also been required to expend its limited resources in considering several motions relating to the late notice of appeal. Accordingly, we sanction appellant $500.00 to reimburse respondent for the costs incurred in bringing the motion to dismiss. Appellant

shall have thirty (30) days from the date of this order within which to make this payment to respondent's counsel and to provide the clerk of this court with proof of such payment.

It is so ORDERED.

(signed), C.J.
Mowbray

(signed), J.
Springer

(signed), J.
Gunderson

(signed), J.
Steffen

(signed), J.
Young

G-1

NEVADA SUPREME COURT ORDER FOR DEFERRED BRIEFING ON MERITS PENDING RESOLUTION OF JULY 9, 1985 APPEAL NOTICE ENTERED NOVEMBER 25, 1985

In the Supreme Court of the State of Nevada

No. 16643

SHERRI SPILLANE, Appellant,

v.

FRANK MORRISON SPILLANE, Respondent.

Order

This is an appeal from (1) a divorce decree and an amended divorce decree; and (2) an order of the district court denying a motion to set aside the divorce decree and the amended divorce decree. Respondent has moved to dismiss the appeal from the divorce decree and amended decree, filed July 9, 1985, as untimely under NRAP 4(a). Respondent has also moved for sanctions on the ground that the appeal is untimely and vexatious. Appellant has moved for an extension of time within which to respond to respondent's motions, up to and including the date on which appellant's opening brief is due.

The original divorce decree and the amended divorce decree were entered on April 7, 1983 and April 26, 1983, respectively. The notice of appeal was filed July 9, 1985. NRAP 4(a) requires that notice of an appeal must be filed

with the district court within thirty days of the date of service of written notice of the entry of the judgment or order appealed from. Appellant argues that the thirty day time period for filing of an appeal has never run because she was not served with written notice of the entry of the orders. However, because appellant asked for the original divorce decree as ordered, was present when the decree was entered, and personally filed the document with the court clerk, it does not appear that further notice was required to trigger the limitations of NRAP 4(a). See In re Herrmann, 100 Nev. 1, 24, 677 P.2d 594, 608-609 (1984).

The district court sent appellant a copy of the amended decree on April 29, 1983, more than two years before this appeal was filed. In Herrmann, supra, this court stated that "it has frequently been held, in various contexts, that when actual notice of a written kind is established, the purpose of the rule is satisfied and no separate formal notice is required." 100 Nev. at 23, 677 P.2d at 608.

In addition, on August 22, 1984, more than ten months before filing this appeal, appellant filed a motion and a complaint seeking to vacate and set aside the original divorce decree and the amended decree. In Herrmann, supra, we noted there was substantial support for the contention that a party could be held to have waived notice by his subsequent conduct in challenging the decision later appealed from. 100 Nev. at 25, 677 P.2d at 609. Thus it appears that the appeal filed on July 9, 1985, should be dismissed as untimely.

Appellant has moved to extend the time within which to respond to the dismissal motion and the motion for sanctions. The ground given for appellant's motion is that respondent's motions go "to the merits of her right to appeal." However, respondent's opposition to appellant's motion to extend time, filed October 7, 1985, states that the motion to dismiss and the motion for sanctions are

wholly based on the procedural defect in the late filing of the appeal. This court has previously indicated that arguments going to the merits of an appeal are not properly considered on a motion to dismiss. Taylor v. Barringer, 75 Nev. 409, 410, 344 P.2d 676 (1959). Thus, appellant's response to the dismissal motion and the motion for sanctions need only address the untimeliness issue. No other valid reason appears why appellant should be granted an extension of time to respond to these motions.

Accordingly, appellant shall have ten (10) days from the date of this order within which to show cause why the appeal filed July 9, 1985, should not be dismissed as untimely, and to respond to respondent's motion for sanctions.

It is so ORDERED.[1]

(signed), C.J.
Springer

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[1] Appellant has also requested an extension of time within which to file the opening brief. Cause appearing, we grant this request. Briefing of the merits of this appeal shall be deferred pending resolution of the motion to dismiss the appeal filed July 9, 1985.

H-1

CONSOLIDATED JUDGEMENT OF THE EIGHTH JUDICIAL DISTRICT COURT DENYING POST TRIAL MOTION CHALLENGING AMENDED DIVORCE DECREE ENTERED APRIL 18, 1985

CASE NOS. D 53075 and A 232411
DEPARTMENT NO. XII
DOCKET

In The Eighth Judicial District Court of the State of Nevada
In and for the County of Clark

SHERRI SPILLANE,

Plaintiff,

v.

FRANK MORRISON SPILLANE,

Defendant.

SHERRI SPILLANE,

Plaintiff,

v

FRANK MORRISON SPILLANE,

Defendant.

Order Denying Motion to Set Aside Decree of Divorce in Case No. D53075 and Order Dismissing Certain Causes of Action of Plaintiff's Amended Complaint in Case No. A232411

Case No. D 53075 and Case No. A 232411 having been heretofore consolidated and matters having come on for hearing in both cases on the 26th day of March, 1985, the Court enters the following Order:

A. Case No. D 53075 having come on for hearing pursuant to Plaintiff's Motion to Set Aside Decree of Divorce, Plaintiff not present, but appearing by and through her attorneys, TINGEY, BURRIS and OVERLEY, and MARTIN MALINOU, ESQ., 334 Smith Street, Providence, Rhode Island, admitted to practice in this Court for purpose of this case; and Defendant not present, but appearing by and through his attorneys, THOMPSON & HARPER, LTD., the Court having examined the pleadings and having heard arguments of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff's Motion to Set Aside Decree of Divorce is hereby denied.

B. Case No. A 232411 having come on for hearing, pursuant to Defendant's Motion to Dismiss pursuant to Nevada Rules of Civil Procedure, Rule 12(b), Plaintiff not present, but appearing by and through her attorneys, TINGEY, BURRIS and OVERLEY, AND MARTIN MALINOU, ESQ., 334 Smith Street, Providence, Rhode Island, admitted to practice in this Court for purpose of this case; and Defendant not present, but appearing by and through his attorneys, THOMPSON & HARPER, LTD., the Court having examined the pleadings and having heard

arguments of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss Plaintiff's Amended Complaint filed on or about January 31, 1985 is granted with prejudice as to Causes of Action 2, 3 and 4 of Plaintiff's Amended Complaint.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Plaintiff's Amended Complaint is denied as to Plaintiff's First Cause of Action.

IT IS FURTHER ORDERED that Defendant has twenty (20) days to answer the remaining First Cause of Action as set forth in Plaintiff's Amended Complaint.

DATED this 16 day of April, 1985.

Myron E. Leavitt /s/

District Judge

I-1

CONSOLIDATED DECISION OF THE EIGHTH JUDICIAL DISTRICT COURT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN COMPANION CASE DELIVERED JULY 16, 1986

District Court
Clark County, Nevada

CASE NOS. D53075 & A232411
DEPARTMENT XII
CIVIL DOCKET R

SHERRI SPILLANE,

Plaintiff,

v.

FRANK MORRISON SPILLANE,

Defendant.

Decision

This matter came on regularly for trial before the Court, sitting without a jury, MARTIN MALINOU, ESQ., of Providence, Rhode Island, appearing as attorney for the Plaintiff and VERONICA BURRIS, ESQ., of the firm of TINGEY & BURRIS, appearing as local counsel for Plaintiff, and CHARLES E. THOMPSON, ESQ. and DONALD J. GREEN, ESQ., of the firm of THOMPSON & HARPER, LTD., appearing as attorneys for Defendant and the Court having heard the testimony of witnesses

examined the exhibits admitted into evidence, read the briefs on the law submitted herein, listened to arguments of counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law constituting the Decision of the Court.

Findings of Fact

The defendant, better known as MICKEY SPILLANE, is one of the world's greatest writers, having authored several books with more than 100 million copies having been sold throughout the world. His creation, MIKE HAMMER, private detective, has been featured in several movies and is the subject of a new television series to begin in the fall, entitled The Return of Mike Hammer.

On November 6, 1964, at the age of 46, MICKEY and SHERRI, who was 23 years old, were married in Malibu, California. Shortly after the marriage, on November 23, 1964, SHERRI executed a release in which she gave up any rights she may have "as the widow of MICKEY SPILLANE, either as dower in his real estate or to any personal property" which he owned or which he should later become possessed.

The parties lived together only about one-half of the time during the marriage. SHERRI performed in musical comedies and accompanied MICKEY on world tours to promote the sales of his books. She appeared on the covers of several of MICKEY's novels, including The Erection Set where she appears in the nude. The Erection Set cover was the subject of special articles in national publications, Esquire and Penthouse.

In May, 1978, MICKEY entered into an agreement with JAY BERNSTEIN to produce movies for television based upon characters created by him. One of the conditions of the agreement was that SHERRI be given a part in the first

movie. She didn't receive the part, but was paid $5,000 to act as a "technical advisor" for Margin for Murder. The movie received good ratings and plans were made to produce additional movies for television.

MICKEY left all of the production and financial details to JAY BERNSTEIN, insisting only upon four conditions:

1) The story would take place in New York City;
2) Mike Hammer would have short hair;
3) Mike Hammer's secretary would be a busty brunette; and
4) Mike Hammer would carry a .45 caliber automatic and not a "sissy" .38 caliber.

MICKEY left SHERRI and California in November, 1979, to live in Murrell's Inlet, South Carolina. Shortly after he left, an English writer and actor, MICHAEL STANDING, became SHERRI's lover and moved into her apartment. He was still living with SHERRI in April 1983, when she filed for divorce. During this period of three and a half years, MICKEY, being unaware of the affair between MICHAEL and SHERRI, faithfully sent her $1,500 each month.

Meanwhile, JAY BERNSTEIN had managed to persuade STACY KEACH to play the role of MIKE HAMMER in a new made-for-television movie, Murder Me, Murder You. SHERRI was aware of the planned movie, having expressed an opinion that STACY KEACH was a good actor and would be a better "Mike Hammer" than the actor who played the part in Margin for Murder.

In early 1983, MICHAEL was having difficulty with the immigration authorities and one way he could remain in this country was to marry an American citizen. MICHAEL then began to pressure SHERRI to divorce MICKEY and marry him. SHERRI consulted a lawyer, MARYANN LaGUARDIA, for advice concerning her property rights and procedures for obtaining a divorce.

After several telephone conversations the parties reached an agreement concerning the divorce. By letter dated March 23, 1983, SHERRI wrote to MICKEY:

> "As we agreed over the telephone, I have sent a notarized statement (enclosed) which clearly states that I will not ask for anything. Either now or in the future, except a year of support and continuing medical insurance costs."

She urged him to "Please try and get the papers signed and returned as soon as possible because I don't want to wait around in Las Vegas longer than I need."

The enclosed statement signed by SHERRI stated that she abandoned "any claims either now or in the future to any property which belongs to MICKEY SPILLANE" and that the "term 'property' refers to all and any property such as real estate, literary rights to novels...and any other literary properties." She excepted from the agreement the literary property known as McGabe formerly known as The Bodyguard by MICKEY SPILLANE, which MICKEY previously had given to her.

By a statement dated March 23, 1983, MICKEY agreed to "continue to support SHERRI SPILLANE...by depositing a sum of $1,500.00 per month for a period of one year" and that he would continue to pay "medical insurance for SHERRI SPILLANE after our pending divorce for as long as I am able or until SHERRI SPILLANE agrees by mutual consent that she is able and in a position to continue paying medical insurance by herself." The parties later agreed the support payment would be one cash lump sum payment of $18,000.

SHERRI planned to travel to Las Vegas and arrange for a "quick" divorce, staying for ten days after sending the forms to MICKEY and then returning to California. Her complaint for divorce was filed March 24, 1983, and MICKEY's Answer in Proper Person was filed April 6,

1983. In the Answer MICKEY agreed to provide SHERRI with adequate medical insurance coverage and to pay her the sum of $18,000 cash as a "lump sum, non-modifiable alimony and property settlement agreement."

At her divorce hearing, SHERRI, appearing without an attorney, testified that she had been a resident of Las Vegas, Nevada for "about four months," that when she moved to Las Vegas it was her intention to make it her home, and that it was her present intention, at that time, to make Las Vegas her home. She further stated that the distribution of the assets between herself and MICKEY was "fair and equitable under the circumstances" of the case. Her resident witness testified that she had seen SHERRI several times every day present in Clark County, prior to the filing of the complaint.

The statute of limitations for the prosecution of perjury expired in April, 1986, just prior to the trial in this case.

The Decree of Divorce filed in the case stated that the Defendant was to receive "an $18,000 cash settlement" and that Defendant was to "pay the medical expenses of Plaintiff." The difference between the Answer in Proper Person and the Decree was called to the attention of the former District Judge and he signed an Amended Decree of Divorce on April 26, 1983, ordering MICKEY to pay for the medical insurance of SHERRI.

The original Decree of Divorce was filed at 9:23 a.m. on April 7, 1983. SHERRI was now free to marry MICHAEL and obtained a marriage license at 9:43 that morning.

Later, the same day, SHERRI, now using the name SELMA MALINOU, married MICHAEL.

MICKEY paid SHERRI the $18,000 agreed upon and subsequently, at her request, sent an additional $2,000 in lieu of paying any medical insurance premiums.

On April 9, 1983, Murder Me, Murder You aired as the "Movie of the Week." It received high ratings and JAY BERNSTEIN then convinced Columbia Broadcasting System to accept a television series based on MICKEY SPILLANE'S MIKE HAMMER. Prior to this time there were no agreements to produce a television series and only upon the personal assurances of STACY KEACH that he would act in the series was the deal consummated.

MICKEY received $20,000 each as his share for both Margin for Murder and Murder Me, Murder You. He was to receive $3,500 per episode for the MIKE HAMMER series.

Subsequently the star of the series, STACY KEACH, was imprisoned in England and the series was cancelled in midseason. After his release from custody, a new MIKE HAMMER movie for television More Than Murder, was produced and aired. Because of its ratings the series Return of Mike Hammer will begin this fall.

MICKEY has remarried since the Divorce Decree became final.

On August 22, 1984, more than sixteen months after the Decree of Divorce SHERRI took legal action to set aside the Decree. She filed a motion in the divorce case (D53075) and filed an independent action (A232411).

This court granted a Motion to Dismiss the independent action and allowed SHERRI to file an amended complaint. The two cases were consolidated and subsequently the Second, Third and Fourth Causes of Action in the independent action were dismissed. An order was entered denying SHERRI's Motion to Set Aside the Decree of Divorce. Both orders have been appealed to the Nevada Supreme Court.

SHERRI claims that MICHAEL, by the use of duress, coercion, intimidation, pressure and threats, compelled her to act against her will in divorcing MICKEY. Further,

that MICKEY put pressures on her that she had a lack of contractual capacity and thereby was prevented from exercising her own will in the divorce action. She states that the actions of both men caused her severe depression and stress so that she was easily manipulated by both.

She also claims that MICKEY fraudulently concealed community property assets from her and that she is entitled to a one-half community property interest in the fair value of the names, MICKEY SPILLANE and MIKE HAMMER, and a one-half interest in the profits received by MICKEY for Murder Me, Murder You and More Than Murder.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law
The Divorce Action

CASE D53075

Nevada Rules of Civil Procedure 60(b) states that a Motion for Relief from a Judgment due to fraud, whether extrinsic or intrinsic must be made within six months after the Judgment was entered.

The Decree of Divorce in this case was filed April 7, 1983, and the Amended Decree of Divorce was filed April 26, 1983. The Motion to Set Aside the Decree of Divorce was filed August 22, 1984, well beyond the six-month period.

NRCP 60(b) also provides that the rule "does not limit the power of a court to entertain an independent action to relieve a party from a Judgment...or to set aside a Judgment for fraud upon the Court."

"The purpose of this part of the rule is to afford relief

upon proof of extrinsic fraud, and the normal six-month limitation of Rule 60(b) has no application." Savage vs. Saltzman, 88 Nev. 193.

"Relief from intrinsic fraud, under NRCP 60(b) must be sought not later than six months after the Decree was entered." Savage vs. Saltzman, supra.

To accept a different rule "would be encouraging endless litigation, in which nothing would ever be finally determined." Chamblin vs. Chamblin, 55 Nev. 146.

The Court has previously denied SHERRI's Motion to Set Aside the Divorce Decree.

The Independent Action

CASE A232411

District Courts have the inherent power to set aside judgments procured by extrinsic fraud. Lauer vs. District Court, 62 Nev. 78, Murphy vs. Murphy, 65 Nev. 264, Colby vs. Colby, 78 Nev. 150 (and cases cited therein).

It is "not every fraud committed in the course of judicial determination [that] will furnish ground for such relief. The acts for which a judgment or decree may be set aside or annulled have reference only to fraud which is extrinsic or collateral to the matter tried by the Court, and not to fraud in the matter on which the judgment was rendered." Confer vs. District Court, 49 Nev. 18.

The allegations of fraud must be pleaded with particularity and supported by clear and convincing proof. Garteiz vs. Garteiz, 70 Nev. 77, NRCP 9(b), Savage vs. Saltzman, supra.

Under Nevada law in order to prevail, SHERRI must prove by clear and convincing evidence that a fraud was committed by MICKEY and that the fraud was extrinsic

or collateral to the divorce proceeding. Gruber vs. Baker, 20 Nev. 453.

"Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the Court by a false promise of compromise, or such conduct as prevents a real trial upon the issues involved, or any other act or omission which procures the absence of the unsuccessful party at trial. Further, it consists of fraud by the other party to the suit which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial." Murphy vs. Murphy, supra; Colby vs. Colby, supra; and Savage vs. Saltzman, supra.

"Fraud is extrinsic or collateral within the meaning of the rule when it is one the effect of which prevents a party from having a trial, or from presenting all of his case to the court, or which operates, not upon the matters pertaining to the judgment itself, but to the manner in which it is procured." Chamblin vs. Chamblin, supra; Mazour vs. Mazour, 64 Nev. 245.

"A distinguishing feature as to when fraud will justify the vacation of a decree is whether or not the wife has had the opportunity of consulting counsel of her own choosing, and the opportunity afforded to present the matters complained of to independent counsel and to the court, so that protection could be afforded." Calvert vs. Calvert, 61 Nev. 169; Mazour vs. Mazour, supra.

The legal test is whether "evidence of the coercion or duress or the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the action so that full examination of the facts could be made and full protection given to the rights of the parties..." If so, then "equity will not interfere but will leave the parties to the fraudulent tran-

sactions whether they have placed themselves." Mazour vs. Mazour, supra.

MICKEY was separated from SHERRI for a period of three and one-half years prior to the divorce and had no personal knowledge of any stress or depression that she may have been suffering at the time of the divorce. He complied with her written and oral instructions and cooperated so that SHERRI could obtain the divorce she desired. He agreed to her terms and promptly carried out his part of the bargain. He did not conceal from SHERRI the new MIKE HAMMER series since he didn't have any personal knowledge prior to the divorce that the movie Murder Me, Murder You would be so successful that as a result the series would be produced.

Any duress, coercion, intimidation, pressures and threats that MICHAEL may have placed on SHERRI cannot be imputed to MICKEY, since MICKEY had no personal knowledge of such actions.

In any event, such alleged frauds are intrinsic in nature and not extrinsic or collateral. Allegations of "lack of real consent to the contract...lack of contractual capacity... lack of consideration...and an actual prevention of the exercise by the Plaintiff of her own free will..." are examples of intrinsic fraud and not sufficient to set aside a decree of divorce. Mazour vs. Mazour, supra.

Allegations of "exertion of duress and coercion... pressure and restraint..." that"...compelled the appellant to act against her will..." and "physical violence, threats, and intimidation..." which forced the spouse"...to conduct herself according to the desires of respondent and virtually took away and destroyed any free agency on the part of appellant..." will not meet the test for extrinsic fraud. Calvert vs. Calvert, supra.

"There were no false promises of compromise nor any other acts or omissions which by design sought to

prevent..." SHERRI"...from ascertaining her rights and defenses or to deny [her] a reasonable opportunity to present them at trial." Aldabe vs. Aldabe, 84 Nev. 392.

The allegations of physical and mental abuse, coercion, duress, threats, and intimidation in the cases cited above were much stronger than those alleged in this case.

SHERRI consulted with an attorney as to her property rights and the procedures for obtaining a divorce. She could have retained an attorney to litigate her claims in the divorce action. MICKEY did nothing to prevent her from presenting her case before the Court. He acquiesced in her every wish.

It has long been the law that he who comes into equity must come with clean hands. SHERRI lived for three and a half years with MICHAEL while accepting monthly payments of $1,500 from MICKEY. She concealed her affair with MICHAEL up to the time of divorce. SHERRI may have committed perjury when she testified that it was her intention to make Nevada her home (NRS 199.120). She may have committed subordination of perjury by requesting CINDY DALESSIO to testify as her resident witness and state to the court that she had seen SHERRI in Clark County, Nevada, several times every day during the six months prior to the divorce, which was an obvious falsehood. SHERRI admitted to having extra marital sexual affairs with other men during her marriage, justifying the actions by claiming MICKEY had given her written permission (Exhibit #21) to do so. Although the document was written by MICKEY, he testified he didn't remember writing it or that if he did he must have been "smashed" at the time.

Twenty minutes after the filing of the Divorce Decree SHERRI took out a license to marry MICHAEL. The Court will not pass judgment on morality, but such

actions certainly are not those of a caring, faithful, loving spouse.

SHERRI has failed to prove any fraud on the part of MICKEY by clear and convincing evidence and her allegations, even if proved, would be intrinsic in nature. She had a fair opportunity to present her claims to the divorce court and MICKEY did nothing to prevent her from asserting her rights.

SHERRI is entitled to nothing by reason of her first cause of action of her complaint.

Because of SHERRI's financial condition and her inability to pay the Court declines to award attorney's fees to MICKEY, but he is entitled to his costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 16th JULY, 1986.

(signed)

Myron E. Leavitt,
District Judge
Department XII

CONSOLIDATED JUDGEMENT OF THE EIGHTH JUDICIAL DISTRICT COURT AGAIN DENYING POST TRIAL MOTION CHALLENGING AMENDED DIVORCE DECREE AND DISMISSING COMPANION CASE WITH $9,101.70 COSTS ENTERED JULY 30, 1986

CASE NOS. D53075 &A232411
DEPT NO. XII
DOCKET "R"

In the Eighth Judicial District Court of the State of Nevada
In and For the County of Clark

SHERRI SPILLANE,

Plaintiff,

v.

FRANK MORRISON SPILLANE,

Defendant.

Judgement

The trial of the above-captioned matter having come on regularly for trial on July 7, 1986, and completed on July 11, 1986 before the Court, sitting without a jury, MARTIN MALINOU, ESQ., of Providence, Rhode Island, appearing as attorney for Plaintiff and VERONICA BURRIS, ESQ., of the firm of TINGEY & BURRIS, appearing as local counsel for Plaintiff, and CHARLES E. THOMPSON, ESQ., and DONALD J.

GREEN, ESQ., of the firm of THOMPSON & HARPER, LTD., appearing as attorneys for Defendant; the Court having heard the testimony of witnesses, examined the exhibits admitted into evidence, read the Briefs on the Law submitted herein, listened to the arguments of counsel, and being fully advised in the premises; and the Court having made findings of fact and conclusions of law constituting the Decision of the court filed on July 16, 1986 in the Office of the Clerk of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark with all counsel of record having knowledge and notice thereof;

IT IS THE JUDGMENT OF THE COURT that Plaintiff SHERRI SPILLANE is entitled to nothing by reason of her First Cause of Action of her Amended Complaint in Case No. A232411;

IT IS THE JUDGMENT OF THE COURT THAT THE Motion to Set Aside the Decree of Divorce filed on August 22, 1984 in Case No. D53075 was beyond the six (6) month period required by Nevada Rule of Civil Procedure 60(b) and is once again denied;

IT IS THE JUDGMENT OF THE COURT that Defendant FRANK MORRISON SPILLANE is entitled to his costs actually incurred in this action in the amount of Nine Thousand One Hundred One and 70/100 Dollars ($9,101.70).

IT IS THE JUDGMENT OF THE COURT that Defendant FRANK MORRISON SPILLANE'S request for attorney's fees in his Answer to Plaintiff's Amended Complaint is denied.

DATED this 28th day of July, 1986.

Myron E. Leavitt

/s/
District Judge

(2)

No. 88-45

FILED

JUL 28 1988

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

—o—

SHERRI SPILLANE,
Petitioner,

vs.

FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,
Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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*On the Brief

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51

CLARIFICATION OF THE QUESTIONS PRESENTED BY PETITIONER

I

Whether the following unpublished Orders of the Nevada Supreme Court, which were issued to halt Petitioner's procedural defaults and abuses of Nevada's Appellate proceedings, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States and Section 362(a) of Title 11, United States Code:

A. October 16, 1986 Order permitting Petitioner's Nevada counsel to withdraw as counsel of record?

B. October 30, 1986 Order denying reconsideration of the Order permitting Nevada counsel to withdraw as counsel of record?

C. September 23, 1987 Order, ordering Petitioner to seek Nevada counsel as required by law, sanctioning Petitioner for filing and processing frivolous appeals, and denying Petitioner's Motion for the appointment of Nevada counsel for a civil appellant in a divorce action?

D. October 29, 1987 Order dismissing Petitioner's May 22, 1985 Appeal due to Petitioner's failure to file a brief and the record in accordance with express, clear Orders of the Nevada Supreme Court?

II

Whether certiorari jurisdiction should be exercised to review the Nevada Supreme Court's Order dated October 29, 1987 which dismissed Petitioner's Appeal due to her flagrant abuses and outright defiance of the Nevada Supreme Court under circumstances demonstrating that Nevada Supreme Court Rule 47 is not a jurisdictional bar to prevent that court from controlling litigants in Nevada Appeals?

III

Whether this Court should review, under State action principles of the due process clause of the Fourteenth Amendment to the Constitution of the United States, the trial court's assessment of the fairness of Petitioner's uncontested divorce action?

TABLE OF CONTENTS

Appendices I through VIII have been lodged as directed by the United States Supreme Court Clerk.

TABLE OF AUTHORITIES

PAGE

UNITED STATES CONSTITUTION

STATUTES

COURT RULES

No. 88-45

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

SHERRI SPILLANE,
Petitioner,

vs.

FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respondent hereby submits this brief in opposition to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent respectfully submits that there is no jurisdiction to grant the Writ.

DECISIONS BELOW

The unpublished Orders of the Nevada Supreme Court and the Decision of the trial court are reproduced in their entirety in Appendices I through VIII. The challenged Orders are not "opinions" because the Nevada Supreme Court is empowered to issue such orders in unpublished form as may be necessary to the proper disposition of matters presented for its review.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

For the convenience of this Honorable Court, the relevant constitutional provisions, statutes, and rules of court are set forth verbatim in Appendix IX but are immediately noted as follows:

(a) U.S. Const. amend. XIV;

(b) 28 U.S.C. § 1257;

(c) 28 U.S.C. § 2101(c);

(d) 11 U.S.C. § 362(a);

(e) U.S. S.Ct. Rule 17.1;

(f) Nevada Rule of Civil Procedure 60(b);

(g) Nevada Rule of Appellate Procedure 27(c);

(h) Nevada Supreme Court Rules 47 and 123;

(i) Nevada Revised Statutes 125.020 and 199.120.

STATEMENT OF THE CASE

Respondent FRANK MORRISON SPILLANE, aka MICKEY SPILLANE (hereinafter MICKEY), respectfully provides the Court with the following background information avoided in the Petition for Writ of Certiorari filed by SHERRI SPILLANE (hereinafter SHERRI).

MICKEY is known as one of the world's greatest writers, having authored several books with more than one hundred million copies having been sold throughout the world. His creation, Mike Hammer, Private Detective, has been featured in several films and was the subject of a television production entitled The Return of Mike Hammer.

MICKEY and SHERRI were married in Malibu, California in November, 1964. The parties resided together for only about one-half of their nineteen year marriage. Their "long distance" marriage ended on April 7, 1983, when SHERRI procured a "quickie" divorce in Las Vegas, Nevada after she and MICKEY entered into a property settlement agreement. (This divorce is discussed below).

Nearly five years prior to the divorce, in May, 1978, while apart from SHERRI who resided in California, MICKEY entered into discussions concerning

television films based upon "Mike Hammer's" adventures. SHERRI initiated litigation in Nevada in 1984 alleging MICKEY's fraud, which was never proven. SHERRI never proved a contract for the "Mike Hammer" productions at the time of the April, 1983 divorce. The trial court observed:

> MICKEY left all of the production and financial details to Jay Bernstein [the producer], insisting only upon four conditions:
>
> (1) The story would take place in New York City;
>
> (2) Mike Hammer would have short hair;
>
> (3) Mike Hammer's secretary would be a busty brunette; and
>
> (4) Mike Hammer would carry a .45 caliber automatic and not a 'sissy' .38 . . . .

App.VIII, Decision, July 16, 1986, pp.2-3.

A. April, 1983: Petitioner's Uncontested Nevada Divorce And The Amended Divorce Decree.

In March, 1983, SHERRI, who resided

in Los Angeles, California, filed for Divorce in Clark County, Nevada. On April 7, 1983, SHERRI appeared in proper person, not being represented by counsel as permitted by law. Her resident witness was Cindy Dalessio of Clark County, Nevada. (By practice under Nevada Revised Statute 125.020, a party offers the testimony of a "resident" witness to verify the residency of the party seeking dissolution of the marriage.) SHERRI's case was called and the standard colloquy in an uncontested, in proper person divorce was conducted in open court after SHERRI and her resident witness swore to tell the truth, the whole truth, and nothing but the truth.

The late Robert Legakes, District Judge, questioned SHERRI, who responded in a cogent and coherent manner. Judge Legakes was satisfied that SHERRI was a resident of Clark County, Nevada, had been separated from MICKEY for over three years and that the distribution of property was fair and equitable under the circumstances. App. VIII, Decision, July 16, 1986, pp. 5-6. The Judge examined SHERRI's resident witness who swore that SHERRI was a bona fide resident of Clark County, Nevada. SHERRI was awarded an absolute decree of divorce.

Minutes, after filing her Divorce Decree, SHERRI and her lover of several years, Michael Standing, were married in Las Vegas.

By a letter dated April 29, 1983 addressed to SHERRI at her Las Vegas address, Judge Legakes enclosed an Amended Decree of Divorce, explaining the action was taken to make the original Decree consistent with MICKEY's Answer in proper person.

B. August, 1984 to July, 1986: The Litigation Initiated By Petitioner To Challenge the Validity of the Divorce Decree.

On August 22, 1984, SHERRI filed an independent lawsuit and a Motion to Set Aside a Decree of Divorce entered on April 7, 1983 pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure. The Motion to Set Aside the Decree of Divorce was dismissed, as was the original Complaint. SHERRI amended her Complaint. All causes of action in the Amended Complaint were subsequently dismissed except the count alleging fraud.

On May 22, 1985, SHERRI appealed the trial court's decision denying the Motion to Set Aside the Decree. The case was docketed in the Nevada Supreme Court.

Trial on SHERRI's independent lawsuit encompassed a week long proceeding in July, 1986. The Honorable Myron E. Leavitt, District Judge, issued a detailed written Decision, finding that SHERRI was entitled to nothing. The trial court highlighted that "[SHERRI] had a fair opportunity to present her claims to the divorce court and MICKEY did nothing to prevent her from asserting her rights." App. VIII, Decision, July 16, 1986, p.13.

After the July, 1986 Decision, SHERRI's brother/attorney Martin Malinou, Esq., of the Rhode Island Bar, only admitted pro hac vice in Nevada, filed three post-trial motions without notices.

Later, Malinou scheduled the hearings for August 21, 1986. On August 21, 1986, the motions were taken off calendar because Malinou's airplane somehow "broke down" in Chicago. (Malinou later admitted that it was financially unfeasible for him to travel from Rhode Island to make all of the post-trial hearings which he set in the trial court.)

Subsequently, the post-trial motions were noticed for hearing on September 25, 1986. In the interim, SHERRI's Nevada counsel filed a Motion to Withdraw which was heard on September 23, 1986. Neither SHERRI nor her brother/attorney, Malinou, bothered to appear. The trial court

granted the Motion to Withdraw filed by SHERRI's Nevada counsel mandating that future consideration of SHERRI's post-trial motions was dependent upon whether Malinou associated with Nevada counsel. SHERRI's post-trial motions were rescheduled.

Again, neither Malinou nor SHERRI bothered to appear at the rescheduled hearing. No excuse was given for Malinou or SHERRI's absence. SHERRI and Malinou failed to procure associate Nevada counsel as ordered. The trial court denied the post-trial motions.

In October, 1986, the trial court revoked the authority of Malinou to represent SHERRI. That Order was due to Malinou's derelictions and refusals to comply with an order concerning his required association with Nevada counsel. Subsequently, Malinou's authority to practice before the Nevada Supreme Court was revoked because he neither associated with Nevada counsel nor requested permission to represent SHERRI at the Nevada Supreme Court. App. V, Order, 9/23/87, p.2.

C. August, 1986 to March, 1988: The Appeals Initiated By Petitioner And The Dismissal of These Appeals.

SHERRI filed a series of appeals to the Nevada Supreme Court. The Nevada Supreme Court considered these successive appeals filed in the eighteen month period from May, 1985 to October, 1986. The first appeal, filed in May, 1985, was dismissed on October 29, 1987 by an Order citing SHERRI's flagrant disregard of the Court's directives and appellate rules. App. VI, Order, 10/29/87, p.2.

On September 4, 1986, SHERRI's July 9, 1985 Appeal was dismissed and sanctions were imposed on SHERRI for bringing an Appeal labeled by the Nevada Supreme Court as grossly untimely and vexatious. However, the Nevada Supreme Court reluctantly permitted SHERRI forty-five (45) days from September 4, 1986 within which to file an opening brief. App. II, Order, 9/4/86. No brief was ever filed. SHERRI was sanctioned $500.00 to reimburse MICKEY but SHERRI has never complied with that Order.

By Order of the Nevada Supreme Court dated October 16, 1986, SHERRI's Nevada Appellate counsel was granted leave to withdraw. SHERRI was granted thirty (30) days within which to secure new Nevada counsel. App. IV, Order, 10/16/86. SHERRI

never complied with that Order. Next, the Nevada Supreme Court directed that Malinou "shall not to be allowed to represent appellant [SHERRI] in these matters unless and until he associates Nevada counsel and is granted permission to do so. Failure to retain counsel as ordered may result in the immediate dismissal of these appeals." App. IV, Order, 10/16/86, pp. 1-2. Malinou never complied with this Order.

On September 23, 1987, the Nevada Supreme Court highlighted:

> We note that appellant has failed to comply with our order of September 4, 1986, issued in No. 16643, ordering her to pay respondent $500.00 and to provide the clerk of this court with proof of such payment. The automatic stay entered by the Federal Bankruptcy Court pursuant to 11 U.S.C. § 362(a) does not apply to our order sanctioning appellant for conduct which occurred after she filed the bankruptcy petition. 'Proceedings or claims arising post petition are not subject to the automatic stay.' . . .
>
> Accordingly, appellant shall have thirty (30) days from the date of this order within which to make this payment and to provide the clerk of

> this court with proof of such payment. Appellant's failure to pay this sum will result in the immediate dismissal of Docket No. 16643 and Docket No. 17584.

App. V, Order, 9/23/87, p3. (citations omitted).

Citing that at least one of SHERRI's appeals was more than two years old, the Nevada Supreme Court found SHERRI's actions inexcusable and ordered her to immediately procure counsel, and to file a brief and a record on appeal. App. V, Order, 9/27/87, p.4. SHERRI never complied with this Order.

On October 29, 1987, after several warnings were given to SHERRI noting her delaying tactics and inexcusable procrastination would no longer be tolerated, the Nevada Supreme Court dismissed SHERRI's appeals. App. VI, Order, 10/29/87.

The Nevada Supreme Court commented that after SHERRI's previous counsel withdrew in October, 1986, SHERRI was ordered to procure Nevada counsel. Nearly one year later in September, 1987, SHERRI was once again permitted thirty (30) days within which to secure Nevada counsel. SHERRI failed to comply with each of these Orders. The Order noted that "the record

in these appeals reveals that appellant [SHERRI] has repeatedly employed tactics of delay and has failed in several instances to comply with our orders." App. VI, Order, 10/29/87, p.2, fn.1.

ARGUMENT IN OPPOSITION TO PETITIONER'S "REASONS" FOR GRANTING THE WRIT OF CERTIORARI

I.

REVIEW BY CERTIORARI WILL WASTE JUDICIAL RESOURCES BY CONSIDERING NEVADA SUPREME COURT ORDERS WHICH SANCTIONED THE PROCEDURAL DEFAULTS AND ABUSES OF NEVADA'S APPELLATE PROCESSES BY PETITIONER AND HER COUNSEL

The "reasons" offered in support of the issuance of the Petition are without merit. In the section, "Reasons for granting the Writ," SHERRI suggests that divorce litigants, even in uncontested proceedings, should be afforded legal counsel at State expense so that the court having jurisdiction over the divorce will somehow satisfy itself of the propriety of the dissolution proceeding and protect such litigants from their own infirmities or incompetence. Next, SHERRI asserts that the Nevada Supreme Court sidestepped its authority by entering orders in what is considered to be a violation of the automatic stay provisions contained in 11 U.S.C. § 362(a). Then, analogy is drawn to a decision of the Utah Supreme Court in Rogers v. Rogers, 671 P.2d 160 (Utah 1983) to create a nonexistent "conflict" between the Utah reported decision and Nevada Supreme Court unpublished orders

disposing of SHERRI's successive and vexatious appeals. Certiorari should not be granted because any review will waste judicial resources by considering Orders which sanctioned the procedural defaults and abuses caused by SHERRI and her counsel.

A. The "Questions" Raised Are Not Sufficiently Important To Warrant Certiorari.

Preliminarily, no "issue" raised by SHERRI meets any standard in United States Supreme Court Rule 17.1. Each of the challenged, unpublished Orders of the Nevada Supreme Court are based upon adequate and independent State grounds. As such, the bases for these Orders are rooted in Nevada Procedure and substantive law, involving no important question to be decided by this Court. See Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Black v. Cutter Laboratories, 351 U.S. 292, 298 (1956); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ([Certiorari] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.")

The Orders disposing of and dismissing SHERRI's Appeals do not rest on

federal grounds. The Orders are based upon Nevada Appellate Rules, decisional authority, and the inherent power of the Nevada Supreme Court to control matters presented for its review. The suggestion that these Orders violated due process and Section 362(a) of Title 11, United States Code -- the bankruptcy automatic stay -- is but an impassioned, last-ditch effort, to salvage a case documented by delaying tactics and a history of abuses. Now, SHERRI attempts to make a "federal case" out of isolated instances in the record through arguments which avoid any meaningful discussion of the reasons why the Nevada Supreme Court dismissed SHERRI's Appeals. In a nutshell, this is the "case of the missing case."

To support Certiorari, a question must be real and substantial. See Zucht v. King, 260 U.S. 174, 176 (1922).

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

Federal questions cannot be fabricated nor based upon incomplete, selective, and synthesized recitals from a clear record which demonstrates that SHERRI is not entitled to certiorari because she failed to comply with clear orders and established Appellate Rules.

If an alleged aggrieved party -- such as SHERRI -- fails to comply with prescribed modes of perfecting appeals or has willfully failed to comply with the directives of an appellate tribunal, then certiorari is unavailable especially where the litigant was afforded an opportunity to comply with such rules and directives. See generally, Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194-195 (1925); Hammerstein v. Superior Court of Calif., 341 U.S. 491, 492-493 (1951); Phyle v. Duffy, 334 U.S. 431, 439-440 (1948) (Certiorari is unavailable to review whether a state procedure deprives one of due process if the petitioner has not properly invoked a state remedy to have this matter determined.)

Indeed, if a state court order dismissing an appeal is based upon the failure to conform to state rules of practice and procedure, neither that order nor the underlying trial court judgment will sustain certiorari jurisdiction. Cf. Newman v. Gates, 204 U.S. 89, 95 (1907).

Nor would any review of the "questions presented" serve a legitimate public interest as distinquished from a false significance attached by SHERRI. This Court has long held that the invocation of certiorari is rooted in a decision that the question is of considerable importance to the public as distinquished from any importance attached by a particular litigant. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). The discretion to issue the Writ should not be invoked because none of SHERRI's questions present any issue of national importance. This request is but another demonstration of SHERRI's frustration with the outcome of her ill-fated case. The Petition should be denied.

B. The Nevada Supreme Court Orders Did Not Violate Due Process.

1. The October 16, 1986 Order Permitting Petitioner's Licensed Nevada Attorney to Withdraw Was Proper.

This Order permitted SHERRI's Nevada counsel to withdraw as counsel of record. App. IV, Order, 10/16/86. That Motion was opposed by SHERRI, citing that the automatic stay provisions in 11 U.S.C. § 362(a) were applicable. SHERRI fails to

advise this Court that the automatic stay prevents actions initiated against the debtor but does not stay actions pursued by the debtor, a distinction of considerable importance.

The October 16, 1986 Order contained an additional challenged directive that SHERRI procure qualified Nevada counsel to represent her interests. This Order rescinded the authority of Martin Malinou, Esq., -- SHERRI's brother and attorney before this Court -- from practicing in Nevada unless and until he associated with Nevada counsel and was granted permission to do so. Neither SHERRI nor Malinou ever complied with this directive.

SHERRI additionally argues that a single Justice of the Nevada Supreme Court granted the Motion for Leave to Withdraw as Counsel of Record filed by SHERRI's then Nevada counsel. A similar argument is advanced concerning the October 30, 1986 Order issued by a panel of three Justices. These Orders were entirely appropriate as authorized by Rule 27(c) of the Nevada Rules of Appellate Procedure, purely matters of Nevada concern.

2. The September 23, 1987 Order Was Proper Because The Nevada Supreme Court Was Under No Duty To Appoint Counsel For Petitioner, A Civil Appellant.

SHERRI claimed a near right to have Nevada counsel appointed to represent her before the Nevada Supreme Court. On December 11, 1986, MICKEY opposed SHERRI's Motion for Appointment of Counsel by the Nevada Supreme Court citing three grounds which stongly support denial of certiorari. First, SHERRI was unworthy of being afforded appointed counsel by the Nevada Supreme Court and, even if the Court was to recognize the availability of such relief in extraordinary civil cases, this case was not a case for appointed counsel. Second, SHERRI admitted in trial court proceedings that she had access to and consultations with attorneys shortly before the time she procured her divorce in April, 1983. Third, SHERRI was never denied meaningful access to the courts of the State of Nevada and, more particularly, was never denied a full and fair opportunity to present her claims in her in proper person divorce and at all stages of her subsequent litigation to set aside the decree of divorce.

Certiorari is unwarranted under these circumstances to consider whether an

uncontested divorce litigant is entitled as a matter of federal constitutional law to have state appointed counsel. The staggering costs and potential drain on the judicial and legal resources of states is evidence enough to preclude certiorari due to the financial impact which such a rule of federal constitutional law would have upon matters of purely local concern. Cf. National League of Cities v. Usery, 426 U.S. 833 (1976).

An identical issue was presented to the New York Court of Appeals In the Matter of Smiley, 330 N.E.2d 53, 55, 369 N.Y.Supp. 2d 87, 90 (1975) where the issue was "[w]hether an indigent Plaintiff wife in a divorce action and an indigent Defendant wife in a similar action are entitled, as a matter of constitutional right, to have the county . . . provide them with counsel or compensation for counsel retained by them." The Smiley court resolved the issue against court-appointed counsel for divorce litigants citing that the judiciary lacked power to compel the expenditure of public funds absent a statutory authorization.

There is nothing in the Nevada Supreme Court Orders evidencing a denial of due process by the refusal of the Nevada Supreme Court to appoint appellate counsel for SHERRI, a civil appellant. In this fashion, the Nevada Supreme Court

correctly ruled that SHERRI was not entitled to appointment of counsel. App. V, Order, pp.1-2. There is no further basis to consider this state court determined issue.

3. The October 29, 1987 Order Dismissing Petitioner's Appeals Was Proper.

The Nevada Supreme Court's Order dated October 29, 1987 did not violate due process. The Order constitutes "state action" but not every incident of "state action" constitutes a violation of due process and certainly not every incident of "state action" requires this Court to grant certiorari.

SHERRI analogizes a strongly worded Order as a violation of due process when, in fact, the October 29, 1987 Order was precipitated by self-imposed procedural defaults and by a refusal to secure Nevada counsel. After several warnings were issued noting that delaying tactics and inexcusable procrastination would no longer be tolerated, the Nevada Supreme Court correctly dismissed SHERRI's Appeals. App. IV, Order, 10/29/87, pp. 1-2.

This Court has held that certiorari is unavailable to review whether a state

procedure deprives one of due process if the alleged aggrieved party fails to properly invoke state remedies to have the matter determined. Compare, Phyle v. Duffy, 334 U.S. 431, 440-442 (1948) and Newman v. Gates, 204 U.S. 89, 95 (1907). Accordingly, the Petition should be denied.

C. The Nevada Supreme Court Orders Did Not Violate Section 362(a), Title 11 United States Code.

The Petition asserts in several instances that the October 16, 1986, October 30, 1986, September 23, 1987 and October 29, 1987 Orders violated 11 U.S.C. § 362(a), the bankruptcy automatic stay. This argument is without merit and certainly presents no basis for granting certiorari.

First, 11 U.S.C. § 362(a) stays proceedings against debtors. Second, 11 U.S.C. § 362(a) has been decided with some degree of unanimity not to stay actions initiated by debtors even if the results of such actions would benefit the estate. Compare, Association of St. Croix Condominium Owners v. St. Croix Hotel, 682 F.2d 446, 448 (3rd Cir. 1982) and In Re Convention Masters, Inc., 46 B.R. 339 (Bankr. D.Md. 1985). Third, because all actions in the Nevada courts were brought by SHERRI to "enforce" what she believed

to be her rights, there was no action against SHERRI to be stayed. Fourth, SHERRI's furtive attempt to "create" a conflict between unpublished Nevada Supreme Court Orders and a Utah decision, Rogers v. Rogers, 671 P.2d 160, 162-3 (Utah 1983), must fail in two respects. Unpublished Nevada Supreme Court Orders cannot be cited as legal authority. Nevada S.Ct. Rule 123. Next, the complaining litigant in Rogers, supra, was the defendant in the divorce action so that proceeding was an action against a debtor who did not initiate a state court action. This Petition should be denied.

II

THERE IS NO BASIS FOR EXERCISING CERTIORARI JURISDICTION TO REVIEW THE CLAIM THAT PETITIONER WAS DENIED DUE PROCESS ON THE THEORY THAT HER APPEALS COULD NOT BE DISMISSED

Misconstruing Nevada S.Ct. Rule 47, SHERRI asserts that MICKEY was required to give notice of the appointment of an attorney for a party appearing in proper person. An identical argument was rejected by the Nevada Supreme Court. This Rule provides:

> Rule 47. Death or removal of attorney: Appointment of another attorney or appearance in proper person. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any other proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

This Rule applies only when a party to an action is required by written notice by the adverse party to appoint another attorney or to appear in person. This Rule does not create an affirmative duty of an adverse party to issue a notice but only when the adverse party desires that the unrepresented person should act with the advice of counsel or in proper person. Next, this Rule does not prevent the Nevada Supreme Court from sanctioning parties who appear in proper person. In any event, the Nevada Supreme Court actually ordered SHERRI to secure new Nevada counsel. Therefore, this is a non-issue in that MICKEY was not required, unless he elected to do so, to file a notice demanding that SHERRI be represented by counsel or represent her own interests, pursuant to Supreme Court Order. In this regard, Petitioner's statement on page 10 of the Petition that

"[t]he Nevada Supreme Court never gave Petitioner the choice of appearing in person" is false in that the Nevada Supreme Court directed SHERRI to secure counsel because that tribunal would not permit SHERRI to represent her interests. Suffice it to say, the challenged Orders were valid exercises of the jurisdiction of the Nevada Supreme Court. The Petition should be denied.

III

THERE IS NO STATUTORY OR SUBSTANTIVE CERTIORARI JURISDICTION TO REVIEW THE PROPRIETY OF AN APRIL, 1983 UNCONTESTED "QUICKIE" DIVORCE PROCURED BY PETITIONER

A. Any Review of the April, 1983 Divorce Decree Is Time Barred.

The Petition asks this Court to review whether or not the divorce court, in April, 1983, some sixty-three months ago, failed to satisfy itself of the fairness of the property distribution in a "quickie" divorce proceeding. Despite its substantive flaws this issue is time barred.

Section 2101(c) of Title 28, United States Codes provides:

> (c) Any other appeal or any writ of certiorari intended to bring any

> judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

The issue is not reviewable because the uncontested divorce proceeding occurred on April 7, 1983 more than ninety (90) days ago and there was no extension of time granted by this Court within which SHERRI may have applied for certiorari. The Petition should be denied.

B. Certiorari to Review a Trial Court Decree, from Which an Appeal Was Not Timely Exhausted, Is Unavailable.

The Divorce Decree was not immediately appealed. If a judgment of a trial court is subject under state law to review by an appellate court, such review must be sought. Minneapolis, St. Paul & SSM R.R. Co. v. Rock, 279 U.S. 410 (1929); Virginian R.R. Co. v. Mullins, 271 U.S. 220 (1926). See also, 28 U.S.C. § 1257. In the instant case, the dismissal of SHERRI's appeals was based upon her failure to perfect appeals

by her refusals to conform to Nevada Rules of Practice and to obtain Nevada counsel. SHERRI had an appeal remedy in April, 1983 which was not exhausted. There is no certiorari jurisdiction to review this issue given SHERRI's opportunity to fully and fairly litigate an appeal in a timely fashion but, due to her own delays, procrastinations, and outright defiance, her claims were properly disposed of by the Nevada Supreme Court.

C. Certiorari Should Not Be Granted To Review A "Quickie" Divorce Procured Through Petitioner's Probable Perjury.

As a discretionary writ, certiorari should be reserved for the most compelling cases of national importance. The writ should not be issued to those who come into a state court system with "unclean hands" only to later challenge and openly defy those same procedures.

In his Decision, App. VIII, pp. 12-13, Judge Leavitt found:

> SHERRI may have committed perjury when she testified that it was her intention to make Nevada her home (NRS 199.120). She may have

committed subornation of perjury by requesting Cindy Dalessio to testify as her resident witness and state to the court that she had seen SHERRI in Clark County, Nevada, several times every day during the six months prior to the divorce, which was an obvious falsehood.

Based upon these established facts and conclusions, the Petition should be denied.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Corey H. Jenkins, a student at Willamette Law School, provided valuable legal research in the preparation of this Brief.

APPENDIX IX

RELEVANT CONSTITUTIONAL PROVISIONS STATUTES AND RULES OF COURT INVOLVED

(a) U.S. Const. amend, XIV:

Section 1. Citizenship: privilege and immunities; due process; equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) 28 U.S.C. § 1257:

§ 1257. State courts; appeal certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(c) 28 U.S.C. § 2101(c):

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) 11 U.S.C. § 362(a):

§ 362 Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C 78eee(a)(3), operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(e) U.S. Supreme Court Rule 17.1:

Rule 17. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons

therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. . . .

(f) Nevada Rule of Civil Procedure 60(b):

Rule 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; . . . The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to

set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(g) Nevada Rule of Appellate Procedure 27(c):

Rule 27. Motions.

(c) Power of a single justice to entertain motions. In addition to the authority expressly conferred by these rules or by law, a single justice of the Supreme Court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the Supreme Court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice may be reviewed by the court.

(h) Nevada Supreme Court Rules 47 and 123:

Rule 47. Death or removal of attorney; appointment of another attorney or appearance in person.

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney shall, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Rule 123. Citation to unpublished opinions and orders.

An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; or (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding.

(i) Nevada Revised Statutes 125.020 and 199.120:

125.020. Verified complaint; residence or domicile; jurisdiction of district court.

1. Divorce from the bonds of matrimony may be obtained for the causes provided in NRS 125.010, by verified complaint to the district court of any count:

(a) In which the cause therefore accrued;
(b) In which the defendant resides or may be found;
(c) In which the plaintiff resides;
(d) In which the parties last cohabited; or
(e) If plaintiff resided 6 weeks in the state before suit was brought.

2. Unless the cause of action accrued within the county while the plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action.

199.120. Definition; penalties.

Every person, having taken a lawful oath or made affirmation in a judicial proceeding or in any other matter where, by law, an oath or affirmation is required and no other penalty is prescribed, who:

1. Willfully makes an unqualified statement of that which he does not know to be true;

2. Swears or affirms willfully and falsely in a matter material to the issue or point in question;

3. Suborns any other person to make such an unqualified statement or to swear or affirm in such a manner;

4. Executes an affidavit pursuant to NRS 15.010 which contains a false statement, or suborns any other person to do so; or

5. Executes an affidavit or other instrument which contains a false statement before a person authorized to administer oaths or suborns any other person to do so,

is guilty of perjury or subornation of perjury, as the case may be, and shall be punished by imprisonment in the state

prison for not less than 1 year nor more than 10 years, and may be further punished by a fine of not more than $10,000.

No. 88-45

In The
Supreme Court of the United States
October Term, 1988

—o—

SHERRI SPILLANE,

Petitioner,

vs.

FRANK MORRISON SPILLANE,
a/k/a MICKEY SPILLANE,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

—o—

PETITIONER'S REPLY BRIEF

—o—

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MR. THOMPSONS DISTORTIONS, EXAGGERATIONS AND AD HOMINEM ATTACKS TO THE CONTRARY, THIS CASE CONSISTS IN THE DENIAL OF SHERRI SPILLANE'S DUE PROCESS RIGHTS

On the morning of April 26, 1983, Mickey Spillane sat in his Las Vegas hotel room placing telephone calls to the Clark County Courthouse. By 10:20 a.m. that morning Nevada Eighth Judicial District Court Judge Robert G. Legakes had signed the ex parte amended decree of divorce.

The amended decree ipso facto changed the date of the divorce from April 7, 1983, to April 26, 1983, added the language "non-modifiable alimony and property settlement", deleted original decree language ordering Mickey to "pay the medical expenses of the plaintiff", and substituted language ordering Mickey to "provide . . . adequate medical insurance coverage". The amended decree was not styled a nunc pro tunc decree. It revised legal rights and obligations which the original decree had settled with presumed finality; therefore, it superseded the original decree.

Once Sherri was forced to engage in extended post trial litigation she was then able to obtain testimony from Judge Legakes, his bailiff Russell Beckwith, his secretary Sheryl Hartle, and his clerk Rose Child at the trial before District Judge Myron E. Leavitt during the week of July 7, 1986. Bailiff Russell Beckwith testified that Judge Legakes had instructed him to find Mickey Spillane in the courthouse lobby and bring him back to chambers.[1] The

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[1]Russell Beckwith, bailiff to Judge Legakes testified as follows:

MR. MALINOU: "Q Under what circumstances did you meet the defendant, Mr. Frank Morrison Spillane?"

(Continued on following page)

bailiff escored Mickey Spillane to a seat beside Judge Legakes' secretary Sheryl Hartle and left the room. Who placed the telephone call to Judge Legakes prompting him to send his bailiff to find Mickey Spillane in the courthouse lobby and bring him back to chambers on the day he entered the amended decree ex parte is a mystery not answered by the trial testimony.[2] And how Judge Leavitt could rule that the amended decree came within the ambit of clerical correction provisions of Rule 60(a) of the Nevada Rules of Civil Procedure remains an equal mystery.

The subject matter of this petition for certiorari is an ex parte proceeding against the petitioner to amend the decree of divorce. Respondent Mickey Spillane's contention (Brief in Opp., p. 23) that 11 U.S.C. 362(a) does not stay actions initiated by debtors is a half truth. Mickey concedes, as he must, that 11 U.S.C. 362(a) stays proceedings against debtors. He then discusses actions initiated by debtors.

The ex parte amended decree challenged Sherri's divorce complaint. 11 U.S.C. 362(a) stays the "continua-

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THE BAILIFF: "A To the best of my recollection, I was instructed by Judge Robert Legakes to go out to the lobby of the courthouse and try to locate Mr. Spillane, which I did."

. . .

MR. MALINOU: "Q Where did you escort him?"

THE BAILIFF: "A Back to chambers."

MR. MALINOU: "Q Would that be Judge Legakes chambers?"

THE BAILIFF: "A Correct."

MR. MALINOU: "Q What happened then?"

THE BAILIFF: "A To the best of my recollection, I went on back to chambers, and he had a seat next to the secretary's desk." (Trial Transcript, sec. 1, pp. 45-46)

tion . . . of a judicial . . . action or proceeding against the debtor". The disjunctive "or" employed by the Congress between "action" and "proceeding" is a recognition that some litigation is composed of discrete disputes within the overall case. A "proceeding" within an overall divorce "case" is the relevant judicial unit for purposes of applying the automatic stay to "proceedings against the debtor". The history of bankruptcy law is persuasive in that there is an uninterrupted tradition of judicial interpretation in which courts have veiwed a "proceeding" within a bankruptcy case as the relevant "judicial unit". For a discussion see, *In Re Saco Local Development Corp.*, 711 F. 2d 441 (CA 1 1983).

The ex parte amended divorce decree proceeding is a separate and discrete dispute within the overall divorce. Mickey had a right to appeal the entry of the original divorce decree awarding Sherri medical expenses rather than medical insurance premium payments. Instead, he moved ex parte to change its award of medical expenses to medical insurance premium payments, and thus initiated a separate discrete dispute; in this discrete proceeding, Sherri was clearly not the initiator and the refusal of the Nevada courts to honor the stay required under bankruptcy law clearly violates her rights as provided by that law.

The normal procedures for amending divorce decrees was not followed by the trial court according to the testimony of Judge Legakes' law clerk Bea Jeannie Banks, Esq.[2] Rule 60(a) of the Nevada Rules of Civil Procedure

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[2]Bea Jeannie Banks, Esq. appearing voluntarily testified as follows:

MR. MALINOU: "Q . . . did you ever have occasion to review a proposed amended decree of divorce in a case called Spillane versus Spillane?"

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allows only clerical errors in decrees to be corrected by the court without prior notice to the parties. Rule 60(a) does not authorize the court to change the date on which parties were divorced,[3] nor change an award of medical expenses

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MISS BANKS: "A No."

MR. MALINOU: "Q Miss Banks, what was the ordinary procedure for obtaining an amendment to a divorce decree in Department XII in April of 1983?"

MISS BANKS: "A There would have to be filed a written motion to amend the decree. That motion would have to have been accompanied by service to the opposing party, and that motion would have come through my desk. I would have had to have reviewed it and submitted my recommendation to the judge."

MR. MALINOU: "Q Do you recall reviewing papers in a divorce case called Spillane versus Spillane?"

MISS BANKS: "A No, I don't."

. . .

MR. MALINOU: "Q If once a proper person divorce had been granted, someone moved to amend the decree, under ordinary procedures would that motion to amend have crossed your desk?"

MISS BANKS: "A Yes, I would review that." (Trial Transcript, sec. 1, pp. 64-65)

[3]The ex parte amended decree changed the date of the divorce from April 7, 1983, to April 26, 1983. It was not styled a nunc pro tunc decree. During the July 1986 trial on fradulent concealment of marital assets allegations District Judge Myron E. Leavitt ruled:

"THE COURT: . . . under our rules, Rule 60(a), that any clerical mistakes, judgments, orders or other parts of the order, errors arising in oversights or omissions, may be corrected by the Court at any time.

"That's apparently what Judge Legakes did. He said there was an error in omission or commission in this case, and corrected it pursuant to Rule 60(a), which he has authority to do.

. . .

"Now all this testimony, at least it seems to me, to be aimed at showing that there was something wrong with what Judge Legakes did when he amended the decree of divorce, that there should have been notice.

"Well, the rule does not require it." (Trial Transcript, sec. 1, pp. 92-93)

to payment of medical insurance premium alone. Mickey has seized on the ruling that the ex parte amendment was authorized and does not create a void decree for lack of jurisdiction remediable under Rule 60(b)(3) as a premise for his argument that Question Presented III (Petition for Certiorari, p. ii) is not reviewable because no appeal was taken from the amended decree (Brief. in Opp., p. 26-27). On the contrary, the court's action in entering the ex parte amended decree denied Sherri her due process rights and must be addressed under Rule 60(b)(3). To refuse such review is an abuse of the court's power. The ex parte amended decree was void for lack of jurisdiction because Mickey did not give her prior notice and opportunity to be heard. As a result of this action by Mickey and by the Court, Sherri challenged the ex parte amended decree under Rule 60(b)(3) of the Nevada Rules of Civil Procedure which allows void decrees to be vacated at any time. Judge Leavitt denied that motion once by Order entered on April 18, 1985 (Petition for Certiorari, p. H-1, 2), and Sherri appealed to the Nevada Supreme Court (docket #16643). Judge Leavitt "once again denied" that motion by Judgment entered on July 30, 1986 (Petition for Certiorari, p. J-1, 2), and Sherri appealed to the Nevada Supreme Court (docket #17584) once again.

THE JUDGMENT SOUGHT TO BE REVIEWED RESTS ON FEDERAL GROUNDS AND NOT ON ADEQUATE, INDEPENDENT STATE GROUNDS

The judgment sought to be reviewed is dismissal of Sherri's appeals because (1) she failed to secure new Nevada counsel within 30 days after September 23, 1987, (2) she failed to file the trial court record in the appeal she noticed on August 12, 1986 from the second denial of

her August 22, 1984 Motion To Vacate Decree Of Divorce challenging the ex parte amended decree of divorce, and (3) she failed to pay to Mickey (a) a $500 monetary sanction assessed on September 4, 1986 for contending that her August 22, 1984 motion labeled "Motion To Vacate Decree Of Divorce" was a motion for a new trial (which tolled the period to appeal the amended decree), and (b) a $500 monetary sanction for filing a notice of appeal on August 12, 1986 which was characterized as duplicating much of her notice of appeal filed on May 22, 1985 appealing the denial of her Motion To Vacate Decree Of Divorce.

The asserted state grounds for dismissal of Sherri's appeals are insufficient because the appellate proceedings in the Nevada Supreme Court were stayed by the automatic stay ordered by the bankruptcy court on February 21, 1985. The state ground must be broad enough, without reference to the federal question, to sustain the state court judgment, notwithstanding any error in deciding the federal question. *Murdock v. Memphis,* 20 Wall. 590, 636 (1875); *Beaupre v. Noyes,* 138 U.S. 397, 401 (1891); *Eustis v. Bolles,* 150 U.S. 361, 370 (1893). Once the error in federal law is corrected and the bankruptcy stay is applied to the appellate proceedings sought to be reviewed, no state ground remains to support the judgment of dismissal.

If, arguendo, the bankruptcy stay does not apply, the state grounds are neither adequate nor independent to support the dismissal of Sherri's appeals. The state ground of decision that Sherri failed to secure new counsel is necessarily interwoven with her right to represent herself. It has long been true that jurisdiction does exist where the state ground "is so interwoven with the other [federal ground] as not to be independent." *Enterprise*

Irrigation District v. Canal Co., 243 U.S. 157, 164 (1917); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *Ake v. Oklahoma*, 470 U.S. 53 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the [state] court's holding is not independent of federal law, and our jurisdiction is not precluded"). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that indigent persons had a right of access to the court in matters of divorce, and had the right to represent themselves. The Nevada Supreme Court order to Sherri to secure new Nevada counsel denies her the right to appear pro se and clearly contradicts *Boddie*.

An untenable state ground is an inadequate state ground. The Supreme Court applies its own standards in making this adequacy inquiry, and is not precluded from reaching its own conclusions. *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931); *Staub v. Baxley*, 355 U.S. 313, 318-19 (1958); *NAACP v. Alabama*, 357 U.S. 449, 455 (1958). Supreme Court review cannot be evaded by reliance on a state ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Canal Co., supra*, at 164. The Nevada Supreme Court ground of decision that Sherri failed to file the trial court record is incorrect on the record. That court acknowledges that the record in appeal #16643 was on file. What that court misconceived is that the August 12, 1986 notice of appeal did not apply to the independent action (Dist. Ct. A232411) judgment for Mickey on Sherri's allegations of fraudulent concealment of marital assets, and expressly disavowed an appeal from the fraud action disposition. The August

12, 1986 notice of appeal was filed to address only that portion of the judgment entered July 30, 1986 which "again denied" Sherri's Motion To Set Aside Decree Of Divorce" (filed August 22, 1984) in divorce case D53075. The court record will show that the transcript of Sherri's argument for reconsideration of the Motion To Vacate Decree Of Divorce and its denial, along with denial of a request for spousal support, heard on the opening day of trial on the fraud count of independent action A232411, was not filed. That transcript, together with the motion for reconsideration, and the motion for spousal support, were the only parts of the appeal record unavailable to the Nevada Supreme Court in the appellate cases sought to be reviewed by certiorari. This petition for certiorari does not seek to review Nevada Supreme Court final disposition of Sherri's notice of appeal file marked November 5, 1986. The reason this petition for certiorari does not seek such review is plain. There is no final disposition. The appeal file marked November 5, 1986 is not docketed in the Nevada Supreme Court. It remains pending.

The Nevada Supreme Court ground of decision that Sherri failed to pay Mickey a total of $1,000 in monetary sanctions is untenable. By its order of September 4, 1986, that court sanctioned Sherri $500 for contending that her Motion To Vacate Decree Of Divorce was entitled to be treated as a motion for a new trial; this contention was plausible. Whereas the Nevada court found the motion's label dispositive, case law clearly supports her reliance on both the substance and timing of her motion as indicative of its true nature. By its order of October 29, 1987, the Nevada Supreme Court misconceived the limited scope of Sherri's appeal of August 12, 1986, characterized it as duplicitous, and sanctioned her an additional $500. This appeal had to be taken to protect her interests because of

the doubtful finality of a district court order entered April 18, 1985, and the possible prematurity of her May 22, 1985, appeal. On the date this appeal was taken (8/12/86), neither of these issues had been resolved, nor could Sherri prudently predict the nature of any future resolution (which occurred in the order entered 9/4/86).

THE ISSUE OF ADEQUACY OF COUNSEL DOES NOT REACH THE LEVEL OF A REQUEST THAT FREE COUNSEL BE PROVIDED FOR INDIGENT AND/OR PRO SE PETITIONERS

There is a due process requirement that the court look for clear warning signs as to the adequacy of counsel or ability of a given plaintiff to represent him or herself. This does not impose on any court an obligation to provide "free" counsel for indigents and/or others appearing pro se in divorce actions.

Sherri has thus far been denied a review on the merits of her claim that she was denied a fair hearing at her original appearance in the Nevada courts by failure of the presiding judge to make any attempt to ascertain whether she was able to represent herself and to warn her of the inherent dangers of acting without counsel. He further failed to advise her of her right to counsel and of the availability of assistance in finding an attorney. The judge failed to ask any questions addressed to her condition and/or competency; such inquiry would have elicited facts compelling an impartial jurist to delay granting of a divorce on that date. Expert testimony has shown that she was incapable of representing herself at that time.[4]

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[4]Sherri Spillane was severely depressed and mentally incompetent at the time of the Nevada divorce proceedings in the opinion of psychiatrist John P. Feighner, M.D. contained in his

(Continued on following page)

The judge compounded this error by allowing an ex parte amendment of the divorce decree and failing to notify her adequately of the changes made therein.[5] The Nevada Supreme Court's refusal to address the issue of competency has still further compounded this error and served to once again deny by avoidance a divorce petitioner's due process rights.

Respectfully submitted,

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deposition in evidence (exhibit # 53) at the trial in the consolidated companion action for civil fraud. At page 27 of the deposition Dr. Feighner testified:

> DR. FEIGHNER: ". . . her reasoning and judgment were massively impaired, . . . she made decisions which no reasonable person under similar circumstances would have made at that point in time, and . . . it's consistent . . . with the fact that she was mentally incompetent at that period of time."

[5]On April 29, 1983, Judge Legakes wrote to Petitioner:

"Dear Ms. Spillane:

"Enclosed please find a certified copy of your amended decree of Divorce which I amended on April 26, 1983. Since your original Decree did not coincide completely with your ex-husband's Answer in Proper Person, the Decree had to be amended.

"If you have any questions regarding this matter, please contact my office."